Supreme Court, U.S.
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No. 03 123 JUL 22 2003

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In The
Supreme Court of the United States

BLUE RIBBON COALITION, et al.,

Petitioners,

v.

MONTANA WILDERNESS ASSOCIATION, et al.,

and

UNITED STATES FOREST SERVICE, et al.,

and

MIDDLE FORK PROPERTY OWNERS ASSOCIATION, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

This case presents virtually the same legal issue as *Utah Shared Access Alliance v. Norton*, No. 02-1703, in which a petition for certiorari is pending before this Court. In each case, the question presented is whether a plaintiff can bypass the typical "arbitrary and capricious" review of discrete agency action under 5 U.S.C. section 706(2) by framing their complaint as a broad challenge to an agency's "failure to act" under 5 U.S.C. section 706(1).

PARTIES TO NINTH CIRCUIT PROCEEDINGS

The following parties were Plaintiffs in the District Court, Appellees in the Ninth Circuit, and are Respondents before this Court:

1. Montana Wilderness Association, Inc.;
2. Friends of the Bitterroot, Inc.; and
3. American Wildlands, Inc.

The following parties were Defendants in the District Court, Appellants in the Ninth Circuit, and are Respondents before this Court:

1. United States Forest Service;
2. Ann Veneman, Secretary, U.S. Department of Agriculture;
3. Bradley Powell, Regional Forester, Region One, U.S. Forest Service; and
4. Dale Bosworth, Chief, U.S. Forest Service.

The following parties were Defendant-Intervenors in the District Court, Appellants in the Ninth Circuit, and are the Petitioners before this Court:

1. Blue Ribbon Coalition, Inc.;
2. Montana Snowmobile Association;
3. Montana 4x4 Association;
4. High Country Trail Riders Association;
5. Montana Trail Vehicle Riders Association;
6. Rimrock 4x4, Inc.;
7. Montana High Country Tours;
8. Bitterroot Adventures; and
9. Sneed's Cycle and Sled.

PARTIES TO NINTH CIRCUIT PROCEEDINGS – Continued

The following party was a Defendant-Intervenor in the District Court and is a Respondent before this Court:

1. Middle Fork Property Owners Association.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, Petitioners hereby disclose that they are nongovernmental corporations, but do not have any publicly issued shares and further disclose there is no parent or publicly held company owning 10% or more of the stock of any of these corporate Petitioners.

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PETITION FOR A WRIT OF CERTIORARI

The Petitioners respectfully request that a writ of certiorari be issued to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding. The opinion was filed on January 6, 2003, and judgment was entered on April 25, 2003.

OPINIONS BELOW

The opinion of the Ninth Circuit, entered on January 6, 2003, is published at 301 F.3d 1146, and is reprinted in the Appendix hereto, App. at 1-12 (hereinafter "*MWA*").

The opinion of the United States District Court for the District of Montana on cross-motions for summary judgment, filed on May 21, 2001, is published at 146 F.Supp.2d 1118, and is reprinted in the Appendix hereto, App. at 13-31.

On February 13, 1998, the United States District Court for the District of Montana issued an unpublished opinion on motions to dismiss. That opinion is reprinted in the Appendix hereto, App. at 32-45.

On April 23, 2003, the Ninth Circuit issued an unpublished order denying petitions for rehearing and remanding this case to the District Court. That order is reprinted in the Appendix hereto, App. at 46-47.

JURISDICTION

The opinion of the Ninth Circuit was filed on January 6, 2003. Respondents U.S. Forest Service, et al., obtained several extensions of time in which to file a petition for rehearing and ultimately did file a timely petition for rehearing on or about March 17, 2003. The petition for rehearing was denied in an unpublished order from the Ninth Circuit filed on April 23, 2003. The judgment of the Ninth Circuit was issued on April 25, 2003. The 90-day period for filing this Petition for Certiorari expires on July 22, 2003. This Petition was in fact filed on or before that July 22 date.

The jurisdiction of this Court to review the judgment of the Tenth Circuit is invoked under 28 U.S.C. § 1254(1).

FEDERAL STATUTES AND RULES INVOLVED

Section 706(1) of the Administrative Procedure Act provides, in relevant part, that

> The reviewing court shall –
>
> (1) compel agency action unlawfully withheld or unreasonably delayed. . . ."

5 U.S.C. § 706(1).

Rule 12 of the Federal Rules of Civil Procedure provides that a defendant may assert, "by motion", the defense of "(1) lack of jurisdiction over the subject matter. . . ." Fed.R.Civ.P. 12(b)(1). Rule 12 further provides "[w]henever it appears by suggestion of the parties or otherwise that the court

lacks jurisdiction of the subject matter, the court shall dismiss the action." Fed.R.Civ.P. 12(h)(3).

STATEMENT OF THE CASE

This Court is presently considering a petition for certiorari[1] in *Utah Shared Access Alliance v. Norton*, No. 02-1703. That petition asks this Court to review the Tenth Circuit's decision in *Southern Utah Wilderness Alliance v. Norton*, 301 F.3d 1217 (10th Cir. 2002) (*"SUWA"*). That petition raises virtually the same issue(s) as this case pertaining to the nature of judicial review under section 706(1) of the Administrative Procedure Act. Accordingly, Petitioners request that the Court hold this Petition for disposition as appropriate in light of its decision in *SUWA*. See R. STERN, E. GRESSMAN, S. SHAPIRO & K. GELLER, SUPREME COURT PRACTICE § 4.16, at 192-193 (7th ed. 1993). In the alternative, if the Court denies certiorari in *SUWA* the Court should consider whether certiorari is more appropriately granted in this case in light of the particular administrative record or framing of the APA "failure to act" claim here.

1. *Background.* On October 9, 1996, Plaintiffs-Respondents Montana Wilderness Association, Inc., et al. ("MWA") filed a complaint in the United States District

[1] Undersigned counsel filed a petition for certiorari in *SUWA* on May 19, 2003. The United States has obtained two extensions of time in which to determine whether to submit a petition for certiorari from the Tenth Circuit's decision in *SUWA*, the second of which expires on July 18, 2003. Thus, by the time this Court receives this Petition there may be multiple petitions pending in *SUWA*.

Court for the District of Montana against the United States Forest Service (the "Forest Service"). App. at 14-15. The complaint focuses on Forest Service management of Wilderness Study Areas ("WSAs") created by the Montana Wilderness Study Act of 1977 (the "Act"). App. at 3-4.

The complaint advanced eleven (11) separate claims for relief, all seeking judicial review under the Administrative Procedure Act, 5 U.S.C. § 551 *et seq.* (the "APA"). App. at 14-15. This Petition focuses primarily on analysis of count I, which ostensibly sought relief under section 10(e)(A) of the APA, codified at 5 U.S.C. § 706(1) ("APA section 706(1)"). App. at 5. Specifically, MWA alleged in count I that "the actions and inactions" of the Forest Service in managing the WSAs have allowed motorized access to WSAs different from that occurring in 1977 "resulting in diminished wilderness character and potential for including in the Wilderness System. . . ." App. at 4. Thus, MWA's section 706(1) claim does not challenge a particular agency decision authorizing or facilitating motorized access to any WSA. Instead, MWA claims, invoking APA section 706(1), that the Forest Service has "unlawfully withheld or unreasonably delayed" full compliance with the Act's preservation duty by allowing continued and expanding motorized access to the WSAs.

2. *Statutory Background.* In the absence of a statute creating an independent right to review, judicial review of federal agency management activities proceeds under the APA. *Lujan v. National Wildlife Federation*, 497 U.S. 871, 882 (1990); *ONRC Action v. BLM*, 150 F.3d 1132, 1135 (9th Cir. 1998).

The APA allows for judicial review of agency action, as well as an agency's failure to act. The starting point in this

jurisdictional analysis is whether the agency has taken "final agency action." See *Lujan*, 497 U.S. at 882-883 (analyzing APA provisions at 5 U.S.C. §§ 702, 704 limiting judicial review to "final agency action" presented by a party "suffering legal wrong" or "adversely affected or aggrieved by agency action within the meaning of a relevant statute . . . "). "Final agency action" occurs when the action "mark[s] the 'consummation' of the agency's decisionmaking process" and when the action is "one by which 'rights or obligations have been determined,' or from which 'legal consequences will flow'. . . ." *Bennett v. Spear*, 520 U.S. 154, 177-178 (1997) (citations omitted). Where a claimant properly challenges final agency action, the reviewing court will analyze the claim under the "arbitrary and capricious" review standard. 5 U.S.C. § 706(2); *Motor Vehicle Mfrs. Ass'n v. State Farm Mutual Automobile Ins. Co.*, 463 U.S. 29, 43 (1983).

The APA also authorizes a reviewing court to "compel agency action unlawfully withheld or unreasonably delayed." 5 U.S.C. § 706(1). This cause of action prevents the agency from avoiding review entirely by failing to do anything, for "[w]hen agency recalcitrance is in the face of clear statutory duty or is of such a magnitude that it amounts to an abdication of statutory responsibility, the court has the power to order the agency to carry out its substantive statutory mandates." *Public Citizen Health Research Group v. Comm'r, Food & Drug Admin.*, 740 F.2d 21, 32 (D.C.Cir. 1984). Courts have referred to this cause of action as "an exception to the final agency action requirement." *ONRC Action*, 150 F.3d at 1137. However, courts have previously found that to properly invoke APA section 706(1) the relevant duty must "provide[ ] a clear statutory duty with which a court can require [the agency]

to comply." *Id.* at 1139. Assuming the presence of such a duty, the claimant must identify "a genuine failure to act" as opposed to "complaints about the sufficiency of an agency action 'dressed up as an agency's failure to act.'" *Ecology Center v. U.S. Forest Service*, 192 F.3d 922, 926 (9th Cir. 1999) (quoting *Nevada v. Watkins*, 939 F.2d 710, 714 n.11 (9th Cir. 1991)); see also *Sierra Club v. Peterson*, 228 F.3d 559, 568 (5th Cir. 2000), *cert. denied*, 532 U.S. 1051 (2001).

The APA standards in this case are applied in the context of the Montana Wilderness Study Act. Pub.L. No. 95-150, 91 Stat. 1243 (1977). In relevant part, the Act provides that the Secretary of Agriculture "shall, until Congress determines otherwise . . ." administer the specified WSAs so as "to maintain their presently existing wilderness character and potential for inclusion in the National Wilderness Preservation System." App. at 4; *Id.* at 20. As the district court explained, the Act was designed to create an interim management status under the assumption that Congress would designate the WSAs in question as wilderness or release them from WSA status within roughly a seven-year period ending in approximately 1984. App. at 18-19.

Nothing in the Act specifically directs the Forest Service to prohibit vehicle access to the WSAs, nor does the Act specify that such access be "frozen" at existing, or any, levels of use. In fact, the Act's legislative history indicates "off-road vehicle[ ]" use is "entirely appropriate in [WSAs]" and directs the agency to manage such use through "the normal Forest Service planning process. . . ." App. at 18 (quoting H.R. Rep. No. 95-620 (1977), at 4). A variety of statutes and regulations provide for and define Forest Service management duties concerning vehicle

access. See e.g. 16 U.S.C. § 1604 (directing generation of "land and resource management plans"); 36 C.F.R. § 219.21 (addressing planning for "recreation resource"); 36 C.F.R. §§ 295.1-295.6 (governing agency management of "motor vehicles off Forest development roads"). Plaintiffs' complaint not only acknowledges but specifically attacks many of the Forest Service's management activities carried out under these varied authorities. See e.g. App. at 39 (analyzing two trail projects in Sapphires WSA); *id.* at 41-42 (discussing "various trail improvement projects" in Hyalite-Porcupine-Buffalo Horn WSA).

Thus, the Act directs the Forest Service to "maintain" the WSAs' "wilderness character and potential for inclusion in the National Wilderness Preservation System" as of 1977, but vests the agency with broad discretion in achieving that mandate, and other mandates, through the "normal" and ongoing Forest planning process.

3. *Federal District Court Rulings.* On two separate occasions the district court analyzed its jurisdiction over the APA section 706(1) claims. The first occasion occurred on a motion to dismiss under Federal Rule of Civil Procedure 12(b)(1). See App. at 33-34. At that time, the district court concluded the Forest Service had conceded that count I stated a justiciable claim but analyzed Petitioners' argument that count I invited improper "region-wide" judicial review in the absence of final agency action. *Id.* at 35. The district court found the Act created an agency duty which could be judicially enforced via APA section 706(1), emphasizing that the Act's duty "is a specific Congressional Order aimed at specific designted areas of federal land within Montana." *Id.* at 36. The district court further determined that the presence of agency action ostensibly

addressing the Act's duties was irrelevant to the jurisdictional question, stating "it is spurious to distinguish between actions and inactions. Under Count I, Plaintiffs could use proof of actions of the Service as *evidence of* the Service's alleged failure to implement the Congressional mandate contained in the [Act]." *Ibid.* (emphasis in original).

The district court revisited these issues in deciding cross-motions for summary judgment. By then the Forest Service had joined in the jurisdictional attack on the APA section 706(1) claims, but the district court characterized the agency's argument as alleging that the agency could essentially ignore detailed analysis of "wilderness character" so long as the WSAs' potential for future designation as wilderness was preserved. App. at 21-22. Through application of this analysis the district court concluded the Forest Service had "failed to consider whether, how, and to what extent its management decisions have impacted the wilderness character of the areas as they existed in 1977, as the [Act] requires." App. at 27. The district court concluded "the Forest Service has 'unlawfully withheld or unreasonably delayed' its maintenance of the Montana [WSAs'] 1977 wilderness character." *Id.* at 27-28. The district court granted summary judgment in favor of MWA on the APA section 706(1) claim of count I and entered judgment accordingly. *Ibid.*

5. *The Ninth Circuit Ruling*. Both Petitioners and the Forest Service filed appeals from the district court's judgment in favor of MWA, "arguing that the district court lacked subject matter jurisdiction under the APA. . . ." App. at 5. Specifically, the appellants advanced two distinct arguments: (1) that the Forest Service duties under the Act "are discretionary and no clear statutory duty exists to authorize review under section 706(1)." App. at 8-9; see

ONRC Action, 150 F.3d at 1138-1139 (articulating "clear statutory duty" standard); and (2) even if the Act creates the requisite duty, the Forest Service has taken action upon that duty and MWA therefore "has not alleged facts demonstrating the Forest Service's complete failure to act. . . ." App. at 10; see *Ecology Center*, 192 F.3d at 926.

The Ninth Circuit, through a unanimous three-judge panel, rejected both arguments. With regard to the "duty" issue, the Circuit concluded the Act "does more than provide a mere policy statement or general guidance; it establishes a management directive requiring the Forest Service to administer the [WSAs] to "maintain" wilderness character and potential for inclusion in the Wilderness System." App. at 9. The Ninth Circuit found the duties at issue in *ONRC Action* distinguishable, apparently implying that they only provided "mere policy statement[s] or general guidance." *Ibid.*

The Ninth Circuit similarly rejected the "genuine failure to act" argument. The court distinguished the duty at issue in *Ecology Center*, characterizing it as a duty "simply to monitor" as opposed to the duty here "to maintain a specified goal, i.e., wilderness character and potential for inclusion in the Wilderness System. . . ." App. at 10. The Ninth Circuit attempted to further distinguish *Ecology Center* by noting that "the record does not demonstrate that the Forest Service performed its obligations in an extensive and detailed manner as it did in *Ecology Center*." *Ibid.* The court characterized the management actions of the Forest Service as "recit[ing] the requirements of the Act" but felt "those decisions did not assess whether wilderness character and potential had actually been maintained in the [WSAs]." *Ibid.*; but see App. at 26 (district court characterization of management actions,

stating "[o]n occasion, the agency considered the impact of management decisions in motorized segments of the [WSAs] on the wilderness character of non-motorized segments as of 1977."). In summarizing its analysis of the "genuine failure" prong of the jurisdictional inquiry, the Ninth Circuit concluded "[t]he simple fact that the Forest Service *has taken some action to address the Act* is not sufficient to remove this case from section 706(1) review." App. at 10 (emphasis added).

However, the Ninth Circuit did not fully affirm the district court's decision. Rather, the Circuit Court disagreed with the district court's conclusion that the alleged failure to consider management decision's impacts on "wilderness character" required entry of summary judgment for MWA. App. at 11. Rather, the Ninth Circuit interpreted the Act as requiring that "wilderness character" actually be maintained, and concluded that a genuine issue of material fact remained as to whether that standard had actually been met, regardless of whether the Forest Service considered the proper standard or not. *Ibid.* As a result, the case has been remanded to the district court "for trial on this issue." *Ibid.*

REASONS FOR GRANTING THE PETITION

Should this Court grant certiorari in *Utah Shared Access*, this Court should hold the Petition here for disposition in light of a decision in *Utah Shared Access*. In the alternative, the Court should grant this Petition to clarify and resolve fundamental and growing conflicts over the APA section 706(1) jurisdictional analysis. As outlined in the *Utah Shared Access* petition for certiorari, the Ninth

Circuit's analysis here and the Tenth Circuit's analysis in *SUWA* cannot be squared with other Circuit Court decisions. Recent decisions illustrate this broadening conflict, and amplify the need for definitive guidance from this Court. This Court should therefore agree to hear at least one of these cases in order to clarify the proper nature of APA section 706(1) judicial review.

A. The Ninth Circuit Decision Expands the Inconsistency Created by *SUWA*.

The Circuit Court decisions under petition cannot be reconciled with prior Circuit Court decisions analyzing APA section 706(1). The Reasons for Granting the Petition in *Utah Shared Access* are fully applicable here. *SUWA* and the Ninth Circuit's decision in *MWA* cannot be reconciled with *ONRC Action, Ecology Center,* or *Sierra Club v. Peterson*.

APA section 706(1) review should only exist to enforce an agency's failure to act on a mandatory and nondiscretionary duty. The nature of the requisite duty closely parallels that required for judicial intervention under the Mandamus Act. *SUWA*, 301 F.3d 1217, 1226 n.6 (10th Cir. 2002); *Independence Mining Co. v. Babbitt*, 105 F.3d 502, 507 (9th Cir. 1997). The clearest example of such a situation occurs when Congress has directed that the agency complete a specified process and the agency fails to do so. See e.g. *Hells Canyon Preservation Council v. Richmond*, 841 F.Supp. 1039, 1048-1049 (D.Or. 1993) (directing agency to complete regulations mandated by Hells Canyon National Recreation Area Act). Even where an agency has admittedly failed to take action within a legally-specified time period courts have declined to exercise section 706(1)

review based on "respect for the integrity of the administrative process. . . ." *Public Citizen*, 740 F.2d at 25, 35 (analyzing claim under section 706(1) that FDA had unreasonably delayed promulgation of regulations, where agency had failed to respond to plaintiffs' rulemaking petition within the required 180 days). Properly understood, *ONRC Action* clarified the nature of the "clear statutory duty" necessary to invoke APA section 706(1). A proper "section 706(1) duty" identifies a procedural event, as opposed to a substantive result. Both the extent of the action required and the time in which it must be taken can be clearly defined. Finally, the ultimate action taken is "final agency action" affording interested parties a right to administrative and judicial review.

A proper section 706(1) claim must also target a "genuine failure to act." See *Ecology Center*, 192 F.3d at 926; *Sierra Club v. Peterson*, 228 F.3d at 568. *Ecology Center* should be understood to focus on whether the agency has taken *any* final agency action on the relevant statutory duty. This is because such action provides a jurisdictional basis for review under the APA, albeit via APA section 706(2) under which the reviewing court must determine whether the action met the "arbitrary and capricious" standard. 5 U.S.C. § 706(2). The purpose of the "genuine failure to act" requirement is to preclude "complaints about *the sufficiency of an agency action* 'dressed up as an agency's failure to act.'" *Ecology Center*, 192 F.3d at 926 (quoting *Nevada v. Watkins*, 939 F.2d 710, 714 n.11 (9th Cir. 1991) (emphasis added). Thus, the important distinction is between the *presence* and *absence* of challengeable final agency action. Where action has been taken, an aggrieved party can seek judicial review by challenging that action under APA section 706(2). For

example, the *MWA* court acknowledged the Forest Service has been making "decisions" affecting the WSAs and even acknowledged the agency "recited the requirements of the Act" in "some" of those decisions, but concluded those decisions "did not assess whether wilderness character and potential had actually been maintained. . . ." App. at 10. These observations go to the *sufficiency* of the agency's decision, not whether the agency has failed to act on the duty in question. A National Forest in Montana must periodically issue a new "travel plan," and if the latest plan utterly fails to mention the Act's applicability to the Forest's WSAs an aggrieved party could bring precisely that challenge, as well as others, to the *sufficiency* of the agency decision. See 36 C.F.R. §§ 295.2, 295.3 (outlining "travel planning" process).

In part, this confusion exists because this Court has never had occasion to analyze these APA jurisdictional questions. The Court's jurisdictional logic in *Lujan* is arguably inconsistent with the *SUWA/MWA* application of APA section 706(1). *Lujan*, 497 U.S. at 894. However, *Lujan* did not involve a complaint invoking APA section 706(1) and the Court was therefore not asked to decide whether a plaintiff may magically avoid the finality requirement and the logic of *Lujan* simply by conjuring a citation to section 706(1). As the *Utah Shared Access* petition discusses, the Court should take this opportunity to provide guidance on proper interpretation of APA section 706(1).

B. The APA Section 706(1) Cause of Action Will Continue to Expand Absent Direction from this Court.

The Circuit Court decisions under petition create a virtually unbounded right to section 706(1) judicial review. These decisions provide no meaningful guidance to courts, practitioners or interested parties with regard to both the "duty" and "genuine failure to act" prongs of the analysis.

An example of this growing potential for confusion is presented by the Ninth Circuit's July 7, 2003, decision in *Center for Biological Diversity v. Veneman*, ___ F.3d ____; 2003 WL 21517980 (9th Cir. 2003). In that case, the Ninth Circuit, relying on *MWA*, determined that the Forest Service could be compelled, via APA section 706(1), to act under 16 U.S.C. section 1276(d)(1). That portion of the Wild and Scenic Rivers Act states:

> In all planning for the use and development of water and related land resources, *consideration shall be given* by all Federal agencies involved to *potential* national wild, scenic and recreational river areas, and all river basin and project plan reports submitted to Congress *shall consider* and discuss any such potentials.

16 U.S.C. § 1276(d)(1); *Center for Biological Diversity*, 2003 WL 21517980 at *3-*4 (emphasis in *Center*). The *Center* plaintiffs sought to use section 706(1) to compel the Forest Service to immediately "amend its Forest Plans to prevent 'potentially destructive activities' that jeopardize the eventual designation of the rivers" identified as potential additions to the Wild and Scenic River System (the "WSRS"). *Id.* at *1. The Forest Service apparently opened itself to this attack by complying with a request from the Arizona congressional delegation to identify "any stream

or river segments in Arizona that satisfy the statutory requirements for inclusion in the WSRS." *Ibid.* The Forest Service generated a 300 page report, identifying "57 rivers and streams that qualified as potential additions. . . ." *Ibid.*

The *Center* plaintiffs apparently sought to use the Forest Service's report as a sword, arguing that by generating the report the agency became subject to a mandatory duty under 16 U.S.C. section 1276(d)(1) to take the identified water segments "into account while planning for the use and development of federal land." *Id.* at *2. The *Center* plaintiffs apparently did not allege (or identify) any particular "final agency action" which failed to adequately consider any of the 57 segments. Rather, the suit appears designed to "compel" a new round of planning to "consider" the identified rivers and streams, which would afford plaintiffs a new chance at preventing "potentially destructive activities." *Id.* at *1.[2]

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[2] "Forest planning" typically involves a two-tiered process, beginning with the adoption of a programmatic "land and resource management plan" or "Forest Plan" which sets goals and provides general guidance. This programmatic analysis is followed by "site-specific" or "project level" analysis in which the agency decides whether to authorize a particular project, such as a logging in a specific area or improvement of a particular trail. See *Ohio Forestry Ass'n v. Sierra Club*, 523 U.S. 726, 729-730 (1998). Both levels typically involve analysis under the National Environmental Policy Act including generation of a public document such as an environmental impact statement, opportunities for public comment, and administrative appeal. See 36 C.F.R. § 219.10 (describing procedure for generating Forest Plan). Typically, numerous interested parties on all sides of every issue participate in this process, with the Forest Service aspiring to a Solomonic result rarely satisfying any party. See *Hells Canyon Alliance v. U.S. Forest Service*, 227 F.3d 1170, 1172 (9th Cir. 2000).

The Forest Service apparently defended in *Center* with a strategy similar to this case: by arguing the statutory language at issue did not create a "clear statutory duty" upon which plaintiffs could compel action via section 706(1), and by arguing that the Forest's ongoing "consideration" of WSR status occurs through the ongoing forest planning process. *Center*, 2003 WL 25157980 at *4-*7. The Forest Service apparently also noted that the ongoing land management planning process would afford the agency, and interested parties like the *Center* plaintiffs, with the opportunity to address all pertinent issues involving the project or activity at issue, including WSR issues. *Id.* at *6 (referencing an agency argument that "the grazing permit process" would afford Center a "possible method[] by which . . . [to] protect a river. . . ."). This argument seems logical, since whatever duty is created by the language at issue in *Center* is predicated upon existing "planning for the use and development of water and related resources." 16 U.S.C. § 1276(d)(1).

The Ninth Circuit rejected the agency's arguments, relying heavily on *MWA*.[3] Regarding the "duty" prong, the *Center* court brushed aside the holding of *ONRC Action*, characterizing the duties at issue there as "generalized policy statements" or "a generalized instruction to federal agencies that may be overlooked." *Id.* at *6. Regarding the "genuine failure to act" prong, the *Center* court rejected the agency's assertion that it had acted and intended to

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[3] Despite patterning its analysis after *MWA*, the *Center* panel incorrectly summarizes that case's procedural history, stating that the Circuit's *MWA* decision reversed a district court decision "dismiss[ing] for lack of subject matter jurisdiction." *Center*, 2003 WL 21517980 at *5.

continue acting on Wild and Scenic Rivers Act duties through the ongoing planning process, summarily stating "[w]e recently rejected this type of generalized defense in [*MWA*]." *Id.* at *6. The Ninth Circuit did not specify how the district court or agency are to proceed, but at least a possible result would be to "compel" the agency to conduct a *new* round of planning in which to perform the withheld "consideration" of potential WSRS segments in all aspects of agency activities.

There is no meaningful way to synthesize the holdings of these cases. Both *MWA* and *Center* provide cursory and ill-defined distinctions from *ONRC Action*, *Ecology Center*, and *Sierra Club v. Peterson*. In the "duty" analysis, the recent decisions focus on the fact that the statutes at issue require a particular result: to "maintain wilderness character and potential" in *MWA* and "to obtain site-specific information to discern the effect of any action" in *Center*. App. at 9; *Center*, 2003 WL 21517980 at *6. Neither decision properly acknowledges the number and breadth of duties analyzed in *ONRC Action*.

First, the *ONRC Action* court analyzed the duty under NEPA's implementing regulations at 40 C.F.R. § 1506.1, concluding that authority did not compel the requested "action." *ONRC Action*, 150 F.3d at 1138 n.4. Additionally, the court analyzed the specific provisions of the Federal Land Policy and Management Act ("FLPMA") cited by the *ONRC Action* plaintiffs as a basis to compel action under APA section 706(1). *Id.* at 1139. While the *MWA* and *Center* courts are quick to characterize all of the duties as "mere policy statements", the *ONRC Action* court only attached this label to 43 U.S.C. section 1701, presumably because that section was, as its title plainly states, a "[c]ongressional declaration of policy." See 43 U.S.C.

§ 1701. The other sections are *substantive* provisions of FLPMA which bear close similarity to the duties at issue in *SUWA*, *MWA*, and *Center*. For instance, the *ONRC Action* plaintiffs sought to compel action via section 706(1) upon the duty that "[i]n managing the public lands, the secretary shall, by regulation or otherwise, take any actions necessary to prevent unnecessary or undue degradation of the lands." *Id.* at 1139 n.7 (quoting 43 U.S.C. § 1732(b)). Under the logic of *MWA*, this is a mandatory command to achieve a specified result: to "prevent unnecessary or undue degradation of the lands." Any interested party could bring suit alleging that the agency was failing to prevent some activity causing "degradation." One cannot meaningfully distinguish between a statutory duty to "maintain wilderness character" and a duty to "prevent unnecessary . . . degradation."

A similar ambiguity plagues the recent decisions' "genuine failure to act" analysis. By finding that APA section 706(1) can be used to challenge "partial" compliance with a legal duty, the *SUWA/MWA/Center* decisions eviscerate *Ecology Center* and eliminate discernible limits on section 706(1) jurisdiction. At best, these decisions make the distinction between a proper and jurisdictionally-flawed section 706(1) claim a "judgment call." A more likely outcome is that *MWA* will allow any section 706(1) claimant to establish jurisdiction simply by characterizing final agency action as "only some action . . . not sufficient to remove this case from section 706(1) review." App. at 10. *Ecology Center* created a test useful and understandable in its simplicity: an agency had either taken final agency action or it had not. The former instance creates an opportunity for review under section 706(2), the latter for review under section 706(1). *SUWA/MWA/Center* replace

this test with one of degree, allowing any moderately-creative plaintiff to survive jurisdictional scrutiny by alleging the agency has not taken enough of the right kind of action.

The *SUWA/MWA/Center* decisions create a world in which land management agencies will become the constant targets of suits alleging a "failure to act" on some party's desired management duty. If *MWA* is any indication, these suits will not be capable of resolution on a motion to dismiss or even cross-motions for summary judgment, but will require trials to assess the actual character of land areas encompassing hundreds of thousands of acres. It seems unlikely that these procedural changes would enhance the agency's ability to actually manage the treasured lands at issue. See *Southern Utah Wilderness Alliance v. Norton*, 301 F.3d 1217, 1246 (10th Cir. 2002) (McKay, J., dissenting). Rather than a "respect for the integrity of the administrative process", these changes reflect a policy of distrust in which the judiciary will sit in constant supervision of ongoing agency activity. See *Public Citizen*, 740 F.2d at 35. At a minimum this expansion of APA section 706(1) should only occur following close analysis by this Court.

CONCLUSION

For the foregoing reasons, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MONTANA WILDERNESS ASSOCIATION, INC.; FRIENDS OF THE BITTERROOT, INC.; AMERICAN WILDLANDS, INC.,

Plaintiffs-Appellees,

v.

UNITED STATES FOREST SERVICE, an agency of the U.S. Department of Agriculture; DAN GLICKMAN, Secretary of the U.S. Department of Agriculture; HAL SALWASSER, Regional Forester for Region One, U.S. Forest Service; JACK WARD THOMAS, Chief, U.S. Forest Service,

Defendants,

MIDDLEFORK PROPERTY OWNERS ASSOCIATION,

Defendant-Intervenor,

and

BLUE RIBBON COALITION, INC.; MONTANA SNOWMOBILE ASSOCIATION; MONTANA 4X4 ASSOCIATION; HIGH COUNTY TRAIL RIDERS ASSOCIATION; MONTANA TRAIL VEHICLE RIDERS ASSOCIATION; RIMROCK 4X4, INC.; MONTANA HIGH COUNTRY TOURS; BITTERROOT ADVENTURES; SNEED'S CYCLE AND SLED,

Defendants-Intervenors-Appellants.

No. 01-35690
D.C. No.
CV-96-00152-DWM

MONTANA WILDERNESS ASSOCIATION, INC.; FRIENDS OF THE BITTERROOT, INC.; AMERICAN WILDLANDS, INC.,

Plaintiffs-Appellees,

v.

UNITED STATES FOREST SERVICE, an agency of the U.S. Department of Agriculture; DAN GLICKMAN, Secretary of the U.S. Department of Agriculture; HAL SALWASSER, Regional Forester for Region One, U.S. Forest Service; JACK WARD THOMAS, Chief, U.S. Forest Service,

Defendants-Appellants,

and

BLUE RIBBON COALITION, INC.; MONTANA SNOWMOBILE ASSOCIATION; MONTANA 4X4 ASSOCIATION; HIGH COUNTY TRAIL RIDERS ASSOCIATION; MONTANA TRAIL VEHICLE RIDERS ASSOCIATION; RIMROCK 4X4, INC.; MONTANA HIGH COUNTRY TOURS; BITTERROOT ADVENTURES; SNEED'S CYCLE AND SLED, MIDDLEFORK PROPERTY OWNERS ASSOCIATION,

Defendants-Intervenors.

No. 01-35713
D.C. No.
CV-96-00152-
DWM

OPINION

Appeal from the United States District Court
for the District of Montana
Donald W. Molloy, District Judge, Presiding

Argued and Submitted
November 6, 2002 – Boise, Idaho

Filed January 6, 2003

Before: Stephen S. Trott, Thomas G. Nelson and Sidney R. Thomas, Circuit Judges.

Opinion by Judge Trott

COUNSEL

Tamara N. Rountree, U.S. Department of Justice, Washington, D.C., for the defendants-appellants.

Paul A. Turcke, Moore Smith Buxton & Turcke, Chtd., Boise, Idaho, for the defendants-intervenors-appellants.

Jack R. Tuholske, Missoula, Montana, for the plaintiffs-appellees.

OPINION

TROTT, Circuit Judge:

The United States Forest Service ("Forest Service") and Intervenors, Blue Ribbon Coalition, Inc., et al., appeal the district court's order (1) determining that it had subject matter jurisdiction over this action under the Administrative Procedures Act ("APA"), and (2) granting the Montana Wilderness Association ("Wilderness Association") summary judgment. We have jurisdiction under 28 U.S.C. § 1291, and we affirm in part, reverse in part, and remand for further proceedings.

BACKGROUND

In 1977, Congress passed the Montana Wilderness Study Act ("the Act") to "provide for the study of certain lands to determine their suitability for designation as wilderness." Pub.L. No. 95-150, 91 Stat. 1243 (1977). The

Act mandates that the Secretary of Agriculture "shall, until Congress determines otherwise," administer specific Wilderness Study Areas ("Study Areas") "to *maintain* their presently existing wilderness character and potential for inclusion in the National Wilderness Preservation System" ("Wilderness System"). *Id.* (emphasis added). The Secretary of Agriculture administers the areas at issue in this case through the Forest Service. Congress intended that, within seven years after the Act was passed, the President would make a recommendation to Congress on whether the Study Areas should be included in the Wilderness System. Twenty-five years later, no final decision has been made to include the Study Areas at issue in this case in the Wilderness System (or to exclude them from the system). Consequently, the Forest Service has been managing the Study Areas under Congress' interim arrangement for more years than intended.

The Wilderness Association claims the Forest Service violated the Act by failing to maintain seven Study Areas' wilderness character and potential for wilderness designation when it "allow[ed], encourag[ed], and/or fail[ed] to act to prevent motorized vehicle use of [the Study Areas] beyond what existed in 1977." Specifically, the Wilderness Association's complaint alleges in Count I that the Forest Service's "actions and inactions" increased the type and amount of motorized activity in all Study Areas, resulting in diminished wilderness character and potential for inclusion in the Wilderness System as it existed in 1977. Count III alleges that the Forest Service's plastic pipe installation, new bridge construction, and reconstruction projects upgrading trails for four-wheel off-road vehicle use in the Hyalite-Porcupine-Buffalo Horn Study Area violate the Act. Count VI alleges that the Forest Service's

action in the West Pioneers Study Area – dynamiting boulders on trails to allow use of four-wheelers, adding gravel to trails, and constructing a new trail for motorized use – has led to an increase in the type and amount of off-road vehicle use, and diminished the area's wilderness characteristics and suitability for inclusion in the Wilderness System.

On cross motions for summary judgment, the district court granted summary judgment for the Wilderness Association on all three counts.[1] The district court determined it had jurisdiction under the APA and concluded that the Forest Service violated the Act by failing "to consider whether, how, and to what extent its management decisions have impacted the wilderness character of the areas as they existed in 1977," and by failing "to develop discernible criteria for assessing and maintaining the wilderness character of non-motorized use areas while conducting trail maintenance and improvement in areas of motorized use." The district court issued a declaratory judgment and an injunction requiring the Forest Service "to comply with the [Act] and to take reasonable steps to restore the wilderness character of each [Study Area] if its wilderness character has been diminished since 1977." The Forest Service and Intervenors timely appealed, arguing that the district court lacked subject matter jurisdiction under the APA and should not have granted summary judgment for the Wilderness Association.

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[1] The remaining counts were either dismissed or subsumed by Count I.

STANDARD OF REVIEW

This court reviews de novo the existence of subject matter jurisdiction and a district court's grant of summary judgment. *Delta Sav. Bank v. United States,* 265 F.3d 1017, 1021, 1024 (9th Cir. 2001). We view the evidence in the light most favorable to the nonmoving party to determine whether any genuine issues of material facts exist and whether the district court correctly applied the relevant substantive law. *Balint v. Carson City, Nev.,* 180 F.3d 1047, 1050 (9th Cir. 1999) (en banc).

DISCUSSION

I Section 706(2) Of The APA

Section 706(2) of the APA authorizes courts to "hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" or "short of statutory right." 5 U.S.C. §§ 706(2)(A), (C). To establish subject matter jurisdiction under this section, the Wilderness Association must demonstrate that the Forest Service's maintenance activities constitute final agency action. *Ecology Ctr., Inc. v. U.S. Forest Serv.,* 192 F.3d 922, 925 (9th Cir. 1999). The district court identified the Forest Service's trail maintenance and improvement work alleged in Counts III and VI as the final "agency action" subject to review.[2]

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[2] The district court also pointed to the Forest Service's failure to "develop discernable criteria" for wilderness characteristics as an agency action. The Act, however, does not require the Forest Service to

(Continued on following page)

The Forest Service argues that this "routine maintenance work" is not final agency action. We agree. Two conditions must be met for agency action to be considered final under the APA. *Id.* at 925. First, "the action should mark the consummation of the agency's decision making process; and [second], the action should be one by which rights or obligations have been determined or from which legal consequences flow." *Id.* (citing *Bennett v. Spear,* 520 U.S. 154, 177 (1997)).

Trail maintenance does not "mark the consummation of the [Forest Service's] decision making process." *Bennett,* 520 U.S. at 177. The Forest Service's maintenance activities implement its travel management and forest plans adopted for the Study Areas. The House Report for the Act states, "[n]othing in the [the Act] will prohibit the use of off-road vehicles, unless *the normal Forest Service planning process and travel planning process,* which applies to all national forest lands, determines off-road vehicle use to be inappropriate in a given area." H.R. Rep. No. 95-620, at 159 (1977) (emphasis added). This legislative history suggests that Congress intended forest and travel management plans to be the consummation of the decision making process with regard to trails allowing off-road vehicle access. Thus, the maintenance of trails designated by those plans is merely an interim aspect of the planning process, not the consummation of it.

In addition, the Forest Service's maintenance of trails does not fit into any of the statutorily defined categories

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develop criteria, and this type of claim more appropriately fits into the "failure to act" category of Section 706(1).

for agency action. *See Lujan v. Nat'l Wildlife Fed'n,* 497 U.S. 871, 899 (1990) (stating the plaintiff "cannot demand a general judicial review of the BLM's day-to-day operations"). "Agency action" is defined to include "the whole or part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act." 5 U.S.C. § 551(13). Jurisdiction under section 706(2) is inappropriate here because the Wilderness Association failed to identify any final "agency action" as defined by the APA. Accordingly, the district court did not have subject matter jurisdiction under the APA to grant summary judgment on Counts III and VI, and we reverse that portion of the district court's order.[3]

II Section 706(1) Of The APA

Section 706(1) of the APA authorizes judicial review to "compel agency action unlawfully withheld or unreasonably delayed." 5 U.S.C. § 706(1). Judicial review is appropriate if the Wilderness Association makes a showing of "agency recalcitrance . . . in the face of clear statutory duty or . . . of such a magnitude that it amounts to an abdication of statutory responsibility." *ONRC Action v. Bureau of Land Mgmt. ("BLM"),* 150 F.3d 1132, 1137 (9th Cir. 1998) (quoting *Public Citizen Health Research Group v. Comm'r, Food & Drug Admin.,* 740 F.2d 21, 32 (D.C. Cir. 1984)).

The Forest Service argues that its duties under the act are discretionary and no clear statutory duty exists to

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[3] To the extent Counts III and VI allege claims based on agency inaction under section 706(1), the district court has jurisdiction and the discussion at *infra* Part II applies.

authorize review under section 706(1). The Forest Service relies on this court's decision in *ONRC Action* for support. 150 F.3d 1132. The plaintiffs in *ONRC Action* alleged that the BLM's refusal to impose a moratorium on certain actions pending completion of an Environmental Impact Statement "would violate the mandates of [the National Environmental Policy Act ("NEPA")], requiring preservation of alternatives during the EIS process." 150 F.3d at 1134-35. They alleged also a violation of the Federal Land Management Policy Act ("FLMPA"), requiring revision of land use plans when "appropriate." *Id.* at 1135, 1139 (quoting 43 U.S.C. § 1701). On the FLMPA claim, we explained that the FLMPA and its implementing regulations set forth policy statements and general guidance, and allow for revision of land use plans without a schedule mandating when plans must be revised, but that neither the FLMPA nor its regulations set forth a clear statutory mandate. *Id.* at 1139-40. We characterized the plaintiffs' challenge as "one seeking to compel compliance with NEPA and FLMPA" and determined that the action was not subject to review under section 706(1) because the BLM did not have a clear duty to impose the requested moratorium under either NEPA or the FLMPA. *Id.* at 1137-38, 1140.

Here, however, the Act does more than provide a mere policy statement or general guidance; it establishes a management directive requiring the Forest Service to administer the Study Areas to "maintain" wilderness character and potential for inclusion in the Wilderness System. Unlike the requested moratorium in *ONRC Action,* the Forest Service's duty to maintain wilderness character and potential is a nondiscretionary, mandatory

duty that it may be compelled to carry out under section 706(1).

The Forest Service argues that even if the Act provides a specific, mandatory duty, the Wilderness Association has not alleged facts demonstrating the Forest Service's complete failure to act, and that review is permitted under section 706(1) "only where there has been a genuine failure to act." *Ecology Ctr.,* 192 F.3d at 926. In *Ecology Center,* the plaintiffs claimed that the Forest Service had not complied with monitoring duties imposed by NEPA and its implementing regulations. *Id.* at 923. This court declined to find a "failure to act" because the record demonstrated "that the Forest Service performed extensive monitoring and provided detailed reports recounting its observations," even though it "failed to conduct its duty in strict conformance with" regulations. *Id.* at 926. In *Ecology Center,* the duty was simply to monitor and the record demonstrated that the Forest Service had performed several actions to comply with this duty. Here, the duty is to maintain a specified goal, i.e., wilderness character and potential for inclusion in the Wilderness System, and the record does not demonstrate that the Forest Service performed its obligations in an extensive and detailed manner as it did in *Ecology Center.* While the Forest Service recited the requirements of the Act in some of its decisions, those decisions did not assess whether wilderness character and potential had actually been maintained in the Study Areas. The simple fact that the Forest Service has taken some action to address the Act is not sufficient to remove this case from section 706(1) review. We conclude therefore that the district court did have subject matter jurisdiction to hear this claim.

However, the district court articulated the "clear statutory duty" in this case as the Forest Service's duty to "*consider* the impact of its decisions on the nature, quality, and scope of the [Study Areas'] wilderness character as it existed in 1977." (Emphasis added). We respectfully disagree. The Forest Service's statutory duty under the Act is more specific. The Forest Service's failure to *consider* the impact of its decisions on wilderness character and potential may be relevant to its duty to *maintain* the wilderness character and potential, but a simple failure to consider without more is not enough to violate the duty *if* the area has been "administered so as to maintain [its] presently existing wilderness character and potential for inclusion" in the Wilderness System.

The Forest Service presented sufficient evidence to support its claim that it has administered the Study Areas so as to maintain wilderness character and potential, and the Wilderness Association has submitted evidence indicating the opposite. Thus, the record reveals a genuine issue of material fact as to whether the Forest Service has discharged its duty to administer the Study Areas so as to maintain their wilderness character and potential for inclusion in the Wilderness System. Accordingly, we reverse the district court's grant of summary judgment, vacate the injunction, and remand for trial on this issue.

CONCLUSION

We conclude that the district court has subject matter jurisdiction over the claims in Count I under section 706(1) of the APA. However, because genuine issues of material fact exist regarding whether the Forest Service met its duty to administer the Study Areas to maintain wilderness

character and potential for inclusion in the Wilderness System, we reverse the district court's grant of summary judgment on Count I and remand for trial.

In addition, we reverse the district court's grant of summary judgment on the agency action alleged in Counts III and VI because the district court lacked subject matter jurisdiction under section 706(2) of the APA. To the extent the Wilderness Association's claims in Counts III and VI were based on the Forest Service's alleged inaction, the district court has jurisdiction under section 706(1) of the APA, but genuine issues of material fact exist precluding summary judgment; accordingly, we also remand for trial on the agency inaction issue in Counts III and VI. Because we reverse the district court's grant of summary judgment on all counts, we vacate the injunction issued by the district court.

AFFIRMED in part, REVERSED in part, and REMANDED for trial.

The parties shall bear their own costs of this appeal.

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MONTANA

MISSOULA DIVISION

MONTANA WILDERNESS ASSOCIATION INC., FRIENDS OF THE BITTERROOT, INC., and AMERICAN WILDLANDS, INC., Plaintiffs, vs. UNITED STATES FOREST SERVICE, an agency of the U.S. Department of Agriculture, HAL SALWASSER, Regional Forester for Region One, U.S. Forest Service, JACK WARD THOMAS, Chief, U.S. Forest Service, Defendants, and BLUE RIBBON COALITION, INC.; MONTANA SNOWMOBILE ASSOCIATION; MONTANA 4X4 ASSOCIATION; HIGH COUNTRY TRAIL VEHICLE RIDERS ASSOCIATION; RIMROCK 4X4, INC.; MONTANA HIGH COUNTRY TOURS; BITTERROOT ADVENTURES; and SNEED'S CYCLE AND SLED, Defendant-Intervenors, and MIDDLEFORK PROPERTY OWNERS ASSOCIATION, Defendant-Intervenor.	) CV 96-152-M-DWM ORDER (Filed May 21, 2001)

I. Introduction

The question in this case concerns the Forest Service's duties under the Montana Wilderness Study Act of 1977. The question arises because the Congress acted with the express intention of further legislating, an intention that has not reached fruition for a myriad of reasons.

The 1977 Act created several Wilderness Study Areas in Montana involving nearly a million acres of land. Within these areas of wilderness study, the Forest Service has implemented diverse management plans and techniques for land use. In nearly a quarter of a century of management, use, and access to the lands in question, there have been changes and increased use. Plaintiffs contend that the Forest Service must not allow increased use of snowmobiles and all-terrain vehicles in Montana's Wilderness Study Areas if such increased use diminishes the wilderness quality of those areas as they existed in 1977. The nature of the Forest Service's duty is complicated by the fact that Congress intended to reach a final decision on wilderness designation of these areas by 1984. The problem is that Congress did act, and did so unequivocally, but Congress' intent to finalize its intention by either designating the lands as Wilderness or releasing them for other use has never happened.

Thus, for the Forest Service, a relatively short-term management task has burgeoned into a seemingly perpetual dilemma. Non-motorized users complain of "creeping motorization"; motorized users fear "creeping designation."

The Complaint

Plaintiffs filed an eleven-count Complaint on October 9, 1996, alleging, in effect, that the Forest Service "unlawfully

or unreasonably delayed action" or abused its discretion, 5 U.S.C. § 706(1), (2)(A), by failing to maintain the wilderness character of the nine Wilderness Study Areas created in 1977 by the passage of S. 393, the Montana Wilderness Study Act (Pub. L. No. 95-150, 91 Stat. 1243 (Nov. 1, 1977)). After discussion among the parties and with the Court, Counts IV, V, VII, and VIII were considered subsumed in Count I and Plaintiff agreed to their dismissal on that basis. Order of February 13, 1998, at 11, 12-13. Count II, concerning the Sapphire Wilderness Study Area, part of Count IX, and Count X were dismissed for failure to exhaust administrative remedies. *Id.* at 5-10, 13. Count XI became superfluous when I determined that Counts I, III, VI, and IX were reviewable under the Administrative Procedures Act, 5 U.S.C. § 706(1), (2)(A). *Id.* at 14. *See also* 5 U.S.C. § 706(2)(C). Thus, the following counts remain at issue:

> **Count I**, alleging that the actions and inactions of the Forest Service in each of the Wilderness Study Areas "have resulted in substantially increased motorized use of WSAs, which has resulted in increased environmental damage, disruption of wildlife and despoiling of aesthetic values," all in derogation of the Wilderness Study Areas' potential for wilderness designation and Congress' management mandate. Complt. at 7, ¶ 12.
>
> **Count III**, alleging that the Forest Service's improvement of erosion bars and placement of new bridges and plastic culvert pipes has so improved trails in the Hyalite-Porcupine-Buffalo Horn Wilderness Study Area in the Gallatin National Forest as to encourage motorized use and diminish the study area's wilderness characteristics and suitability for wilderness designation.

Count VI, alleging that the Forest Service dynamited boulders, placed crushed gravel, and constructed new trails in the West Pioneers Wilderness Study Area in the Beaverhead National Forest, thus encouraging increased motorized use and compromising the wilderness quality of the area.

Count IX, alleging that the Forest Service violated its duty to assess the cumulative impacts of increased motorized use of Wilderness Study Areas when it categorically excluded trail improvement projects from review under the National Environmental Policy Act.

All parties moved for summary judgment, and oral argument was heard. For the reasons set forth below, summary judgment is granted in favor of Plaintiffs on Counts I, III, and VI. Count IX will be dismissed without prejudice.

II. The Montana Wilderness Study Act

The roots of the Montana Wilderness Study Act reach back to 1967, when the United States Forest Service undertook an inventory of certain roadless and undeveloped areas in national forests. S. Rep. No. 95-163 (1977), at 2. The "Roadless Area Review and Evaluation," known as RARE, was completed in 1972. Nine seemingly wild areas in Montana were rejected for further wilderness study because they were arbitrarily divided into smaller units and were then found to be too small to sustain an appropriate level of "solitude," or because they contained some commercial timber, or because the Forest Service

sought more "purity" than the areas could provide.[1] H.R. Rep. No. 95-620 (1977), at 2.

In 1976, the Senate Committee on Energy and Natural Resources brought to the floor S. 393, a bill authored by Senator Lee Metcalf. S. 393 would have identified these nine areas as "wilderness study areas" to be considered for designation as Wilderness Areas under the Wilderness Act of 1964. The bill passed the Senate by a voice vote on August 23, 1976,[2] but died when the 94th Congress adjourned.

In the 95th Congress, Senator Metcalf reintroduced the bill, explaining that:

> [d]uring the study period, and until Congress determines otherwise, *these areas are to be managed* by the Secretary *so as not to diminish their presently existing wilderness character and potential.* This language regarding wilderness character and potential was added by the committee last Congress (and retained in this year's version) to assure *continued enjoyment* of the areas *by those recreationists whose pursuits will not,* in the judgment of the Secretary, *preclude potential wilderness designation for the areas.*

S. Rep. No. 95-163, at 2 (emphasis added).

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[1] *Cf. Parker v. United States,* 309 F. Supp. 593 (D. Colo.1970) (enjoining proposed timber sale in area bordering primitive area on grounds that border area contained most characteristics of primitive area, notwithstanding presence of "substantially unnoticeable" access road).

[2] S. Rep. No. 95-163, at 2, says the bill passed on August 23, 1977. However, the Senate Report is dated May 14, 1977. Presumably the date of the previous bill's passage is inaccurate.

The House of Representatives was also involved in trying to resolve the question of how the land should be designated and what its use should be. Recognizing one of two concerns aired in committee hearings, the House Report considered and accepted continuing use of off-road vehicles in the nine areas that now are the subject of this lawsuit:

> The *use of off-road vehicles,* while generally prohibited in designated wilderness areas, *is entirely appropriate in wilderness study areas. . . . Nothing* in S. 393 *will prohibit the use of off-road vehicles, unless the normal Forest Service planning process . . . determines off-road vehicle use to be inappropriate* in a given area. . . . [I]t is the intention of the committee that the areas in S. 393 remain open to off-road vehicle use unless and until they are formally designated as wilderness.

H.R. Rep. No. 95-620 (1977), at 4 (emphasis added).[3]

The clarity of Congress' endorsement of continuing off-road vehicle use is qualified by the fact that Congress also intended to reach a final decision about such use within a short time, when it was to decide whether to designate any of the nine areas as Wilderness Areas. The House Committee on Interior and Insular Affairs, wary of "tying up this large acreage in wilderness study status for longer than is necessary," H.R. Rep. No. 95-620 (1977), at 1, recommended that the Forest Service "give a high priority to the completion

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[3] The House Report is frequently quoted in Forest Service documents in the Administrative Record. Although references may exist, the Court did not note any reference to Senator Metcalf's Report, quoted above, which stated the areas should be managed "*so as not to diminish* their presently existing wilderness character and potential" (emphasis added).

of all nine studies within a period of 24 to 30 months (or less), if at all possible," and that the President "make his recommendations to Congress . . . [in] no more than 6 months," *id.* at 2. The "legislative force" of the Act was directed at a more modest pace. It allowed 5 years for study and 2 years for executive review and recommendations. *Id.* Thus, Congress anticipated that each area designated as a wilderness study area would either be designated Wilderness or would be removed from the protective cover of the study by about 1984.

Today, 24 years after the enactment of S. 393, the nine areas it set aside remain "Wilderness Study Areas."[4] The Forest Service remains charged with managing the areas "so as to maintain their presently existing wilderness character and potential for inclusion in the National Wilderness Preservation System," Pub. L. No. 95-150, § 3(a), 91 Stat. 1243 (1977). The controversy at hand questions what it means to "maintain" these areas-in-limbo. Did Congress intend to keep the land and its use as it was in 1977? Or did Congress intend to preserve the potential of the land without major concern for its use while it was studied?

III. Analysis

A. Count I

The Montana Wilderness Study Act provides:

> Except as otherwise provided by this section . . . the wilderness study areas designated by this Act

[4] The Senate report's finding that "[l]ittle, if any, additional paperwork would result from the enactment of S. 393," S. Rep. No. 95-163 (1977), at 17, was perhaps prophetic.

> shall, *until Congress determines otherwise, be administered* by the Secretary of Agriculture so as *to maintain their presently existing wilderness character and potential for inclusion in the National Wilderness Preservation System.*

Pub. L. No. 95-150, § 3(a), 91 Stat. 1243 (1977) (emphasis added).

Congress has not used the identical phrases contained in this statute in any other bill. The parties agree that motorized use is not consistent with wilderness character, *see* 16 U.S.C. §§ 1131(c), 1133(c), but further agree that Congress intended to allow some motorized use to continue.

Relying on language in the Federal Land Policy and Management Act, Plaintiffs argue that the Act established a "non-impairment" standard and directed the Forest Service to maintain the status quo of 1977, restricting the types of vehicles and levels of use that could be accommodated. The Forest Service and the Intervenors argue that Congress only directed maintenance of the areas' potential for designation as Wilderness: "*If* Congress acts to designate these areas as Wilderness, they *will have* the same potential for solitude and primitive recreation as they did in 1977." Def. Br. at 8 (emphasis added).

1. Defendants' Interpretation and *Chevron* Deference

Under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), and *Haynes v. United States,* 891 F.2d 235, 238-29 (9th Cir. 1989), *cited in* Forest Service Br. at 1-2, an implementing agency's interpretation of a statutory scheme is entitled to deference if Congress has not spoken directly to the question

raised and if the agency's interpretation of the statutory language is reasonable. *Chevron* deference is not due if the agency's interpretation is contrary to the statute. *See Echazabal v. Chevron U.S.A., Inc.*, 226 F.3d 1063, 1069 (9th Cir. 2000).

Congress has spoken directly to the issue presented here, i.e., the management objectives of the Forest Service. Congress required the agency to manage the Wilderness Study Areas "so as to maintain their presently existing wilderness character and potential for inclusion in the National Wilderness Preservation System."

The language of the statute commands the United States Forest Service to do two things. It requires the Forest Service to "maintain [the areas'] presently existing wilderness character," and it requires the Forest Service to "[maintain their] potential for inclusion in the National Wilderness Preservation System." If the areas' wilderness character is maintained, then undoubtedly their potential for designation is maintained. But maintaining the land's potential for designation as Wilderness does not necessarily ensure the maintenance of their 1977 "presently existing" wilderness character.

The Forest Service argues that it need not do the first if it can pledge the second. Under that reasoning, temporary trails might be laid down in every segment of every Wilderness Study Area, regardless of whether the trails were there in 1977, so long as the traces of those trails could be removed within a reasonable time after Congress selected the area for designation as Wilderness. The Forest Service and the Intervenors do not argue that motorized use has not increased, nor do they argue that this increased use has had no effect on the Wilderness

Study Areas. Rather, they argue that whatever motorized use is now allowed does not compromise the areas' potential for designation as Wilderness Areas.

But that is not a reasonable interpretation of what Congress demanded. To accept the Forest Service's argument, one must ignore the first phrase of Congress' imperative, so that the statute says that the Wilderness Study Areas must be administered "so as to maintain their [. . .] potential for inclusion in the National Wilderness Preservation System." Under the Defendants' and Intervenors' reading, the phrase "presently existing wilderness character" is surplusage, because it could mean only that the areas have potential to be included in the National Wilderness Preservation System. To ignore part of what Congress said in a statute is not reasonable, even under a deferential reading.[5]

Construing the first statutory phrase not as surplusage but as meaningful, no interpretation can make "presently existing wilderness character" mean anything

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[5] Moreover, Congress did not require that the Wilderness Study Areas be managed in accordance with standards existing prior to the Act, although the Wilderness Act itself did so. Such standards would have come from the Multiple Use Act, 16 U.S.C. § 528 ff. *Compare* 16 U.S.C. § 1132(b) (requiring Forest Service to manage areas designated "primitive" as of September 3, 1964, to be managed "under the rules and regulations affecting such areas on September 3, 1964 until Congress has determined otherwise"). Nor did the advent of RARE II, the Forest Service's second round of inventories of roadless areas and evaluations for Wilderness designation, vitiate Congress' intent to set aside these Montana areas under its own peculiar standard. Thus, for the Forest Service to manage the areas under criteria more appropriate to the Multiple Use Act or RARE II is to ignore a Congressional mandate.

other than the wilderness character existing at the time Congress issued its mandate. In 1977, it was impossible to say "presently existing" and mean "existing in 1996 or 2001." In 1977, Congress required preservation of the status quo as regards the study areas' wilderness character.

2. Plaintiffs' Interpretation

On the other hand, Plaintiffs' reading of the statute is not entirely correct either. They employ the same "gap" theory of statutory interpretation used by the Defendants and Intervenors: where the language does not support your interpretation, leave gaps. The Wilderness Association's interpretation of the statutory language renders the second phrase surplusage. In Plaintiffs' view, the statute would say that the Wilderness Study Areas must be administered "so as to maintain their presently existing wilderness character [pending a decision as to their] inclusion in the National Wilderness Preservation System." As stated above, maintaining each Wilderness Study Area exactly as it existed in 1977 would necessarily mean that the areas' "potential for inclusion in the National Wilderness Preservation System" was also maintained. Therefore, there would be no need for Congress to include the latter phrase.

3. Legislative History and Context

The meaning of the apparently incongruous statutory terms can be fleshed out by recourse to legislative history, as all parties have suggested. That history indicates Congress' awareness when enacting the questioned statute that the Wilderness Study Areas included some areas

where motorized use was allowed and some areas where it was not allowed. The wilderness character of the study areas may not have been perfect or complete; otherwise, they might have been designated Wilderness Areas instead of study areas. But the wilderness character of the land areas was not absent either. To the extent the wilderness character was there, Congress wanted to maintain it.[6] To the extent the wilderness character was lacking, Congress did not want to impose it.[7] One Wilderness Study Area could contain areas that had wilderness character to be kept intact while other parts were beyond the Wilderness pale.

Even so, Congress did not require a "freeze" of all activity. It contemplated that use levels might fluctuate and that types of motorized vehicles might change. Congress intended that existing and new or different uses should be accommodated, so long as they did not undermine an area's potential for Wilderness designation *and* so long as they did not undermine the area's presently existing wilderness character.

4. The Meaning of the Montana Wilderness Study Act of 1977

In short, the statute requires the Forest Service to strike – and maintain – a balance between wilderness

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[6] Senator Metcalf stated the areas were to be managed "*so as not to diminish* their presently existing wilderness character and potential." S. Rep. No. 95-163, at 2 (emphasis added).

[7] "Nothing in S. 393 will prohibit the use of off-road vehicles." H.R. Rep. No. 95-620 (1977), at 4.

character and motorized use.[8] Because Congress did not require a "freeze," it did not require that only those segments of the Wilderness Study Areas already open to motorized activity should remain so, or that those segments already closed should remain so. Indeed, that plan could result in "freezing out" motorized use altogether or, on the other hand, in precluding Wilderness designation, due to degradation of the wilderness character (for example, by excessive use impacts) over time. Instead, Congress required that the Forest Service ensure continuing opportunities for enjoyment of the study areas by use of motorized vehicles, as well as continuing opportunities for enjoyment of the study areas' character *qua* wilderness.

Consequently, in making decisions about trail maintenance, improvement, construction, motorized use, and closings, the Forest Service must consider the impact of its decisions on the nature, quality, and scope of the particular study area's wilderness character as it existed in 1977. Conversely, in making decisions about trail closings, the Forest Service must consider the impact of its decisions on the nature, quality, and scope of motorized use as it existed in 1977, provided that it also considers what is necessary to avoid precluding Wilderness designation by changing the character of the land through new, different, or expanded diverse uses.

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[8] In 1996, District Ranger Larry Timchak of the Judith Ranger District noted "While motorized users typically have a high tolerance for non-motorized recreationists, the reverse is typically not the case." A.R. Vol. 5, Bk. 1, Sec. 12, Doc. No. 32, Decision Notice and Finding of No Significant Impact, Middle Fork Judith Road and Trailhead Improvement, at DN-4. No doubt Ranger Timchak's observation was as true in 1977 as it was in 1996 and is today.

5. Merits of Count I

A search of the 47-volume Administrative Record in this case shows that the Forest Service did not base its management of these areas on a coherent description of either the "presently existing wilderness character" in 1977 or the opportunities for motorized use in 1977. On occasion, the agency considered the impact of management decisions in motorized segments of the study areas on the wilderness character of non-motorized segments as of 1977. *See, e.g.*, A.R. Vol. 5, Bk. 1, Sec. 12, Doc. No. 32, Decision Notice and Finding of No Significant Impact, Middle Fork Judith Road and Trailhead Improvement, at DN-4 ("Development of new routes could occur in the Area Closure G area which could detract from its existing wilderness character. . . . The 1977 Montana Wilderness Study Act as well as the legislative history point out that wilderness study areas need not be managed as wilderness, except as to maintain their presently existing wilderness character.").

However, sporadic consideration of the Congressional mandate is not sufficient. Nor is consideration possible without a meaningful standard. *See, e.g., Neighbors of Cuddy Mountain v. United States Forest Service,* 137 F.3d 1372, 1379 (9th Cir. 1998) ("To 'consider' cumulative effects, some quantified or detailed information is required.").

Furthermore, the Forest Service has not proffered any reason for its failure to consider the impact of its management decisions on the wilderness character or motorized uses of the areas in 1977. The management rationale

is reflected in the notion that anticipated designation is the greater part of management.

Congress does not ask agencies to do the impractical. *Inland Empire Public Lands Council v. United States Forest Service,* 88 F.3d 754, 764 (9th Cir. 1996). But an assessment of the Montana study areas' wilderness character and the associated motorized uses in 1977 is not, and was not, impractical. The Forest Service developed the Wilderness Attribute Rating System to identify and evaluate wilderness character. One of these attributes – solitude – appears most likely to be impacted by management decisions in motorized use areas, not necessarily because well-maintained trails might lead to more traffic, but because the aural traces of motorized use are difficult, if not impossible, to manage and control. The Rating System was introduced in 1967, with the Roadless Area Review and Evaluation. While it might in some instances be too generalized to be useful, *see, e.g., California v. Block,* 690 F.2d 753, 763-64 (9th Cir. 1982), it does provide a benchmark for prospective management and specific criteria to guide and exemplify the agency's exercise of its discretion. The Forest Service has also completed studies regarding each Wilderness Study Area's suitability for Wilderness designation.

Because the Forest Service has interpreted the Act to require only that the areas' potential for wilderness designation be maintained, it has failed to consider whether, how, and to what extent its management decisions have impacted the wilderness character of the areas as they existed in 1977, as the statute requires. I conclude that the Forest Service has "unlawfully withheld or unreasonably delayed" its maintenance of the Montana Wilderness Study Areas' 1977 wilderness character. 5

U.S.C. § 706(1); Complt. at 7, ¶ 12. Plaintiffs are entitled to summary judgment on Count I.

B. Counts III and VI

Plaintiffs are also entitled to summary judgment on Counts III and VI. The Forest Service has not considered whether, how, and to what extent its management decisions in the Hyalite-Porcupine-Buffalo Horn Wilderness Study Area in the Gallatin National Forest and in the West Pioneer Wilderness Study Area in the Beaverhead National Forest have impacted the nature, quality, and scope of the wilderness character of those areas as they existed in 1977. Thus, the agency has unlawfully withheld or unreasonably delayed its maintenance of the areas' 1977 wilderness character.

To the extent Counts III and VI pertain to final agency actions already taken, the Forest Service abused its discretion and acted arbitrarily and capriciously, 5 U.S.C. § 706(2)(A), and acted "short of statutory right," *id.* § 706(2)(C), in failing to develop discernible criteria for assessing and maintaining the wilderness character of non-motorized use areas while conducting trail maintenance and improvement in areas of motorized use.

C. Count IX

Under the National Environmental Policy Act, an environmental impact statement must be prepared for "major Federal actions significantly affecting the quality of the human environment." 16 U.S.C. § 4332(2)(C). Because the Forest Service made its decisions regarding categorical exclusions under the wrong statutory standard, the Court has no way of determining whether its application of

categorical exclusions violated NEPA or not. To allow the agency to reconsider under the appropriate standard, Count IX is dismissed without prejudice.

D. Remedy

In this case, Plaintiffs requested declaratory and injunctive relief. *See* Complt. at 14-15, ¶¶ 1-6. Ordinarily, the remedy in a lawsuit involving an administrative agency's actions is remand to the agency. This approach acknowledges the agency's unique expertise and its responsibility to execute the law by allowing the agency to reformulate its objectives and exercise its discretion in planning to fulfill them.

The appropriate remedy is to allow the Forest Service to consider its management of the Montana Wilderness Study Areas in light of the correct statutory standard. Plaintiffs are entitled to declaratory judgment and to injunctions requiring the Forest Service to comply with the statute and to take reasonable steps to restore the wilderness character of each Montana Wilderness Study Area if its wilderness character has been diminished since 1977.

IV. Conclusion

In 1977, Congress intended to decide[9] the fate of 973,000 acres of Montana land by 1984, at the latest. To

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[9] *See* Ambrose Bierce, *The Devil's Dictionary* 29 (Dover ed. 1952) (1881-1906) (defining "decide" as "[t]o succumb to the preponderance of one set of influences over another set.").

make an informed decision, it set the land aside for study. To keep its options open and to continue to allow the areas to provide the kinds of experiences that people drew from them in 1977, Congress ordered the Forest Service to "maintain their presently existing wilderness character and potential for inclusion in the National Wilderness Preservation System."

Had Congress acted when it intended to, the Forest Service would not face its decades-long management dilemma. Nonetheless, the statutory imperative is not diminished by time. Congress may choose not to act on these areas for some time to come. That question is a matter solely for Congress. Whether Congress acts tomorrow or years from now or never, the 1977 Montana Wilderness Act requires that the nature, quality, and scope of experiences supported by the Wilderness Study Areas shall be maintained, awaiting Congress' decision.

Accordingly, IT IS HEREBY ORDERED that Plaintiffs' motion for summary judgment (dkt # 68) is GRANTED as to Counts I, III, and VI of the Complaint. Count IX of the Complaint is DISMISSED without prejudice.

IT IS FURTHER ORDERED that the Clerk of Court shall enter Judgment by separate document. The Judgment shall state that the Forest Service violated Pub. L. No. 95-150, § 3(a), 91 Stat. 1243 (1977), by failing to administer the Montana Wilderness Study Areas so as to maintain each area's wilderness character as it existed in 1977.

IT IS FURTHER ORDERED that the United States Forest Service is ENJOINED from taking any action in any Montana Wilderness Study Area that diminishes the

wilderness character of the area as it existed in 1977 or that diminishes the area's potential for inclusion in the National Wilderness Preservation System.

IT IS FURTHER ORDERED that the United States Forest Service is ENJOINED to take reasonable steps to restore the wilderness character of any Montana Wilderness Study Area as it existed in 1977 if the area's wilderness character or its potential for inclusion in the National Wilderness Preservation System has been diminished since 1977.

IT IS FURTHER ORDERED that Plaintiffs are entitled to their costs and attorneys' fees under the Equal Access to Justice Act. Plaintiffs shall serve and file an application on or before June 22, 2001. Defendants and Intervenors may respond to the application on or before July 13, 2001.

DATED May 20th, 2001.

/s/ Donald Molloy
Donald W. Molloy, Chief Judge
United States District Court

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
MISSOULA DIVISION

MONTANA WILDERNESS ASSOCIATION INC., FRIENDS OF THE BITTERROOT, INC., and AMERICAN WILDLANDS, INC., Plaintiffs, vs. UNITED STATES FOREST SERVICE, an agency of the U.S. Department of Agriculture, HAL SALWASSER, Regional Forester for Region One, U.S. Forest Service, JACK WARD THOMAS, Chief, U.S. Forest Service, Defendants, and BLUE RIBBON COALITION, INC.; MONTANA SNOWMOBILE ASSOCIATION; MONTANA 4X4 ASSOCIATION; HIGH COUNTRY TRAIL VEHICLE RIDERS ASS'N; RIMROCK 4X4, INC.; MONTANA HIGH COUNTRY TOURS; BITTERROOT ADVENTURES; and SNEED'S CYCLE AND SLED, Defendant-Intervenors, and MIDDLEFORK PROPERTY OWNERS ASS'N, Defendant-Intervenor.	CV 96-152-M-DWM ORDER (Filed Feb. 13, 1998)

I. BACKGROUND

Plaintiffs filed an eleven count complaint On [sic] October 9, 1996, seeking declaratory and injunctive relief against the United States Forest Service. They allege the Forest Service failed to maintain the wilderness character and potential of nine areas designated as Wilderness Study Areas (WSA) by Congress in the Montana Wilderness Study Act (MWSA), P.L. 95-150, 91 Stat. 1243, 1243-44 (1977). The essence of the complaint is that the Forest Service (Service) degraded the wilderness potential of the WSA by facilitating increased motorized access to the WSA through various trail maintenance and improvement projects.

The complaint makes the following claims: Count I alleges that the Service violated the MWSA by its actions and inactions in the WSA; Counts II-VIII describe specific activities or projects that the Service carried out in each individual WSA in alleged violation of the MWSA; Count IX is a claim under the National Environmental Policy Act (NEPA) and alleges three actions in violation of NEPA; Count X is a claim under the National Forest Management Act (NFMA); and Count XI alleges that Counts I-X are reviewable under the Administrative Procedures Act (APA).

At the February 14, 1997 pretrial conference, Plaintiffs agreed to eliminate Counts IV, V, and VII because those claims are subsumed in Count I. Plaintiff [sic] also agreed that part of Count IX (NEPA claim, ¶ 22(c)) could be eliminated because any question about the proposed copper mine in Swimming Woman Canyon is not ripe for judicial review.

At the pre-trial conference, Defendant-Intervenors Blue Ribbon Coalition et al (Coalition) were granted intervention of right with respect to Counts I-VIII, i.e., those counts relating to WSA, and permissive intervention with respect to the NEPA and NFMA claims. On April 9, 1997, permissive intervention on all counts was ordered for Defendant-Intervenor Middle Fork Property Owners Association.

Both the Service and the Coalition filed Motions to Dismiss. I find the motions should be granted in part and denied in part.

II. DISCUSSION

A. Overview

The Service argues that the counts pertaining to specific activities in the WSA (Counts II, III, VI, VIII, IX and X) should be dismissed either for lack of subject matter jurisdiction pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure or pursuant to the APA. The argument is premised on exhaustion, ripeness and mootness. The Service concedes that Plaintiffs have stated a claim in Count I.

On the other hand, the Coalition argues the entire complaint should be dismissed. The Coalition contends that Plaintiffs have not exhausted administrative remedies in objecting to the actions of the Service in the WSA. Alternatively, the argument goes, plaintiffs have not identified those projects where a right to judicial review has been preserved after exhaustion of the administrative process. Additionally, the Coalition believes Count I should be dismissed because it impermissibly seeks

judicial review under the Administrative Procedures Act (APA) in the absence of a final agency action. Each count of the complaint is considered below.

B. Count I (Montana Wilderness Study Act)

Count I alleges that the "actions and inactions of the Forest Service as described herein since 1977 have resulted in substantially increased motorized use of WSA, which has resulted in increased environmental damage, disruption of wildlife and despoiling of esthetic values." Compl. at 7. The claim goes on to allege that by allowing increased motorized use of WSA, the Service has not maintained the wilderness character and wilderness potential of the study area.

While the service acknowledges a claim is stated in Count I, the Coalition characterizes it as a "region-wide" challenge to Service actions affecting the study area. Such a challenge cannot be mounted in the absence of final agency action at the regional level according to the Coalition's view.

Agency action is not subject to review under the APA unless the action is 'final.' 5 U.S.C. § 704; *Bennett v. Spear*, 137 L.Ed 2d 281, 304-05 (1997). Final action must "mark the 'consummation' of the agency's decision making process," and must "be one by which 'rights or obligations have been determined,' or from which 'legal consequences will flow.'" *Id.* at 305. While plaintiffs do not implicate any final agency action on a regional level that meets this standard, and thus are not entitled to obtain review of agency action at a regional level pursuant to 5 U.S.C. § 706(2), there is more to the claim than the Coalition suggests.

Plaintiffs can state a claim under Count I for agency review pursuant to 5 U.S.C. § 706(1). That law states:

> To the extent necessary to decision, and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall –
>
> (1) compel agency action unlawfully withheld or unreasonably delayed;

Id.

The Montana Wilderness Study Act contains a Congressional mandate that the Wilderness Study Areas shall be administered "so as to maintain their presently existing wilderness character and potential for inclusion in the National Wilderness Preservation System." MWSA, P.L. 95-150. This legal mandate is not a "general statutory mandate to protect resource values," as suggested by the Coalition. It is a specific Congressional Order aimed at specific designated areas of federal land within Montana.

The plaintiffs seek review of whether the Service "unlawfully withheld or unreasonably delayed" action to carry out that Congressional Order. 5 U.S.C. § 706(1). A section 706(1) claim is the proper means of questioning whether the Service is violating the Congressional mandate under the MWSA. Further, in reviewing the Service's administration of the WSA as a whole, it is spurious to distinguish between actions and inactions. Under Count I, Plaintiffs could use proof of actions of the Service as *evidence of* the Service's alleged failure to implement the Congressional mandate contained in the MWSA.

Accordingly, Coalition's Motion to Dismiss with respect to Count I is hereby DENIED.

C. Count II (Sapphire WSA)

Count II involves claims about the Services [sic] actions in the Sapphire WSA. According to this claim, the Service degraded the Sapphire study area's wilderness character by implementing trail improvement and reconstruction projects. The principle change is allegedly caused by the upgrade of trails to accommodate four-wheel off-road vehicle (ORV) use. Plaintiffs claim that these and similar actions violate the MWSA. Count IX (Compl. at ¶ 22(a)), involves allegations that the actions of the Service in the Sapphire WSA violate NEPA as well.

The Service argues that Count II should be dismissed for failure to exhaust administrative remedies, that the claim is moot because the projects have been completed, and that the claim is not ripe with respect to potential future actions.

The mootness argument is not persuasive in the context of the APA claim. The doctrine of mootness is like "'the doctrine of standing set in a time frame.'" *None* [sic] *Eskino* [sic] *Community v. Babbitt*, 67 F.3d 813, 815 (9th Cir. 1995). Thus, mootness "restricts judicial power to the decision of cases and controversies" in which "the plaintiff has suffered an injury in fact, traceable to the challenged action, *and likely to be redressed by a favorable decision.*" *Id.* (emphasis added). A controversy is moot "either when the injury is healed and only prospective relief has been sought, or when it becomes impossible for the courts to redress the injury through the exercise of their remedial

powers." *Fund For Animals v. Babbitt*, 89 F.3d 128, 133 (2nd Cir. 1996).

This case can be distinguished from *Native Americans For Enola v. United States Forest Service*, 60 F.3d 645 (9th Cir. 1995). There, an appeal from a decision to grant a permit to use a Forest Service road accessing a timber harvest on private land was adjudged moot because the logging was complete and the permit expired. *Id.* at 646. The injury in *Native Americans For Enola* was beyond relief. Here, I could conceivably craft a remedy to redress the claimed injury even though the projects in question are complete. Consequently, the claim is not moot from review under the APA.

The Service's mootness argument is not persuasive in the context of NEPA. Generally, NEPA functions to protect the environment "by focusing Government and public attention on the environmental effects of *proposed agency action*." *Marsh v. Oregon Natural Resources Council*, 490 U.S. 360, 370 (1989) (emphasis added). Even so, NEPA review is not foreclosed after a project has been completed if an appropriate remedial order could be entered. *Columbia Basin Land Protection Ass'n v. Schlesinger*, 643 F.2d 585, 591 n.1 (9th Cir. 1981) (claim that Environmental Impact Statement on proposed power line violated NEPA not moot because court could order power line moved); *cf. Sierra Club v. Penfold*, 857 F.2d 1307, 1318 (9th Cir. 1988) (NEPA claim moot because completed mining operations could not be "unmined," nor could reclamation be ordered under facts of the case); *see also Airport Neighbours Alliance, Inc. v. United States*, 90 F.3d 426, 429 (10th Cir. 1996) (NEPA challenge to Environmental Assessment of runway extension at Albuquerque Int'l Airport not moot after runway completed because

court could order closure of runway or impose restrictions on its use). The claim under NEPA is not moot.

The Service argues exhaustion precludes consideration of the projects complained of in Count II. Exhaustion of the administrative process is a jurisdictional prerequisite for judicial review. *Darby v. Cisneros*, 509 U.S. 137, 146-147 (1993).

The two projects in the Sapphires complained of here were the subject of separate Decision Memos (DM). A DM dated October 16, 1992, describes improvements to Fish Lake Trail #39. That project involved closing two spur trails accessing high-county lakes and constructing a new trail on a more friendly grade. The Decision Memo addresses the public comments on the improvements. It notes that discussions were held with Friends of the Bitterroot and with the Montana Wilderness Society, both plaintiffs in this case. The DM also describes the process for Administrative Review or Appeal. AR Vol. 3A-64. Plaintiffs did not appeal.

A Decision Memo dated March 15, 1993, describes a heavy trail maintenance project of Fish Lake Trail #39. The project involved the use of heavy equipment "to reduce the width of the trail from 10-20 feet to 6 feet on the outside edge of the existing fire lines by placing material on the inside edge." The project was further described this way, "Narrowing will be accomplished by pulling fill, laying back vertical banks, and placement of rocks and logs on the inside. Long-life drive through drainage dips will be installed to provide adequate diversion for run-off." AR Vol. 3A-63. No public comments were received. The Memo described the process for appeal. *Id.* Plaintiffs did not appeal.

Plaintiffs want to "end run" their failure to exhaust by arguing that the DM did not accurately describe the nature of the projects in terms of their negative effect on the wilderness qualities of the Sapphire WSA. The evasive argument is unpersuasive. A similar argument was rejected in *Nevada Land Action Ass'n v. Untied States Forest Service,* 8 F.3d 713 (9th Cir. 1993).

In that case, a group of ranchers challenged a Land and Resource Management Plan (LRMP) developed by the Service for the Toiyabe National Forest. The ranchers thought the LRMP would lead to decreased levels of grazing in the forest. *Id.* at 715. They argued that the Service did not comply with the notice and public participation requirements of the National Forest Management Act. They also claimed there was no "meaningful public participation" and that they were misled by a statement in the proposed plan suggesting the preferred alternative would not alter current grazing levels. *Id.* at 719.

The Ninth Circuit rejected the argument "because the public was on notice of all details of the proposed plan. . . ." *Id.* The court held "[s]ince the Service did not conceal anything from the public or guarantee that its projections would be accurate, the public was sufficiently informed to be able to participate meaningfully in the planning process." *Id.*

Similarly, the DM here describes the projects adequately. Plaintiffs had opportunity to comment and to appeal. As in *Nevada Land*, plaintiffs here were sufficiently informed about the trail projects to allow meaningful participation in the notice and appeal process. If the "end-run" analysis is accurate, it would completely undermine the exhaustion requirement. Any party could

ignore the appeal process and avoid exhaustion by claiming the questioned proposal did not materialize as that party envisioned. Such a finding would negate the exhaustion requirement. It might also foster a practice of nonparticipation at a level of decision making intended to reduce issues on review.

Failure to exhaust administrative remedies precludes review under the APA for alleged violations of the MWSA. Failure to exhaust also precludes APA review for alleged violations of the NEPA process. NEPA does not authorize a private right of action. *Lujan v. National Wildlife Federation*, 497 U.S. 871, 882 (1990). Instead, "A NEPA challenge is brought under the APA against the federal agency and its officers." *Sierra Club v. Penfold*, 857 F.2d at 1315; *Sierra Club v. Slater*, 120 F.3d 623, 630 (6th Cir. 1997).

Accordingly, IT IS ORDERED:

(1) The motions to dismiss are GRANTED with respect to Count II. Count II is hereby DISMISSED for failure to exhaust administrative remedies.

(2) The motions to dismiss are GRANTED with respect to that part of Count IX (NEPA claim) referring to the Sapphire WSA (Compl. at ¶ 22(a)). Count IX is hereby DISMISSED in that part for failure to exhaust administrative remedies.

D. Count III (Hyalite WSA)

Count III involves the Hyalite-Porcupine-Buffalo Horn (HPBH) WSA in the Gallatin National Forest. It is alleged that various trail improvement projects have so increased motorized use in the WSA that it violates the MWSA.

Another claim in Count III is that the Service violated NEPA by undertaking a large trail reconstruction project in the HPBH WSA without NEPA review of any kind. *See* Count IX, Compl. at ¶ 22(b).

The Service again invokes the doctrine of mootness. The projects are completed. For reasons stated above, the mootness argument is rejected.

Exhaustion is not at issue in Count III. The Service determined that the projects complained of are subject to categorical exclusion for purposes of NEPA. *See* 40 C.F.R. § 1508.4. As such, they are not subject to appeal. *See* 36 C.F.R. § 215.8(a)(4). Thus, the agency cannot avoid review of these projects for failure to exhaust administrative remedies under 5 U.S.C. § 706(2) when violations of the MWSA and NEPA are alleged.

Accordingly, IT IS ORDERED:

(1) The motions to dismiss are DENIED with respect to Count III. Count III states a claim for review under the APA that the Service violated the MWSA by its actions in the HPBH WSA.

(2) The motions to dismiss are DENIED with respect to that part of Count IX (NEPA claim) referring to the HPBH WSA (Compl. at ¶ 22(b)).

E. Count IV (Big Snowies WSA)

Count IV relates to activities in the Big Snowies WSA in the Lewis & Clark National Forest. Count IV was eliminated by stipulation of plaintiffs. That is reflected in the court's Scheduling Order of February 18, 1997.

F. Count V (Middle Fork Judith WSA)

Count V relates to activities in the Middle Fork Judith WSA in the Lewis & Clark National Forest. Count V was eliminated by stipulation of plaintiffs. That is also reflected in the court's Scheduling Order of February 18, 1997.

G. Count VI (West Pioneer WSA)

Count VI relates to activities in the West Pioneer WSA in the Beaverhead National Forest. The complaint involves trail maintenance work on the Lacy Creek trail, including removal of rocks, building bridge approaches, placement of culverts and sections of trail relocation.

The situation here is similar to the one in the Hyalite-Porcupine WSA discussed under Count III. The projects were subject to categorical exclusion and not, as a consequence, appealable. Exhaustion is not at issue. As in Count III, the Service argues that the projects are complete thus making the claim moot. For reasons set forth above, the Service's mootness argument is rejected.

To the extent that Plaintiffs seek review, pursuant to § 706(2) of the APA, of projects undertaken by way of categorical exclusion within the West Pioneer WSA for violations of the MWSA, they have properly stated a claim under this count.

Accordingly, IT IS ORDERED:

(1) The Motions to Dismiss are DENIED with respect [sic] Count VI. Count VI states a claim for review under the APA that the Service violated the MWSA by its actions in the West Pioneer WSA.

H. Count VII (Ten Lakes WSA)

Count VII relates to the Ten Lakes WSA in the Kootenai National Forest. By stipulation of plaintiffs, Count VII was eliminated because it is subsumed in Count I. That is reflected in the court's Scheduling Order of February 18, 1997.

I. Count VIII (Bluejoint WSA)

Count VIII relates to the Bluejoint WSA. Upon review of the Administrative Record, Plaintiffs stipulated to a voluntary dismissal of Count VIII. It too, is subsumed under Count I. IT IS ORDERED that Count VIII be dismissed.

J. Count IX (NEPA claim)

This count is a claim under NEPA. Its component parts are discussed above. (See discussion of Counts II and III above). After my rulings above, and after stipulation of plaintiff's counsel at the pretrial conference, this claim now stands DISMISSED with respect to paragraphs 22(a) & (c) of the complaint. The NEPA claim remains with respect to paragraph 22(b) of the complaint pertaining to actions in the HPBH WSA.

K. Count X (NFMA claim)

Count X is a claim under the National Forest Management Act (NFMA). Plaintiffs claim that the Service violated Forest Plans promulgated pursuant to the NFMA in the Deer Lodge National Forest and the Bitterroot National Forest by its trail maintenance projects in the Sapphire WSA.

Like NEPA, a claim for judicial review of an alleged violation of the NFMA must follow the Administrative Procedure Act. *See, e.g., Inland Empire Public Lands Council v. Schultz,* 992 F.2d 977 (9th Cir. 1993). As noted in the discussion involving the Sapphire WSA, plaintiffs did not exhaust administrative remedies on these projects. APA review of alleged violations of the NFMA is now precluded.

Accordingly, IT IS ORDERED:

(1) The motions to dismiss are GRANTED with respect to Count X and Count X is hereby DISMISSED for failure to exhaust administrative remedies.

L. Count XI (omnibus APA claim)

Count XI is an omnibus count alleging that all preceding counts are reviewable under the APA. I have already determined where APA review is available under the counts remaining. Count XI is superfluous. For that reason, it is DISMISSED.

Wherefore, the Service's and Coalition's Motions to Dismiss are GRANTED IN PART and DENIED IN PART as specifically ordered above.

IT IS FURTHER ORDERED that a status conference will be held by telephone in Missoula on ***Friday, March 13, 1998***, at ***9:30 a.m.*** **The court will place the call.**

DATED: February 13, 1998.

/s/ Donald W. Molloy
Donald W. Molloy
United States
District Judge

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

MONTANA WILDERNESS ASSOCIATION, INC.; FRIENDS OF THE BITTERROOT, INC.; AMERICAN WILDLANDS, INC.,

Plaintiffs-Appellees,

v.

UNITED STATES FOREST SERVICE, an agency of the U.S. Department of Agriculture; DAN GLICKMAN, Secretary of the U.S. Department of Agriculture; HAL SALWASSER, Regional Forester for Region One, U.S. Forest Service; JACK WARD THOMAS, Chief, U.S. Forest Service,

Defendants-Appellants,

and,

BLUE RIBBON COALITION, INC.; MONTANA SNOWMOBILE ASSOCIATION; MONTANA 4X4 ASSOCIATION; HIGH COUNTY [sic] TRAIL RIDERS ASSOCIATION; MONTANA TRAIL VEHICLE RIDERS ASSOCIATION; RIMROCK 4X4, INC.; MONTANA HIGH COUNTRY TOURS; BITTERROOT ADVENTURES; SNEED'S CYCLE AND SLED; MIDDLEFORK PROPERTY OWNERS ASSOCIATION,

Defendant-Intervenors.

No. 01-35713

D.C. No. CV-96-00152-DWM
District of Montana, Missoula

ORDER

(Filed Apr. 23, 2003)

Before: TROTT, T.G. NELSON, and THOMAS, Circuit Judges.

The panel as constituted above has voted to deny the petition for rehearing, and to deny the petition for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc and no judge of the court has requested a vote on it. Fed. R. App. P. 35(b).

The petition for rehearing and the petition for rehearing en banc, are DENIED.

The mandate shall issue forthwith.

Supreme Court, U.S.
FILED
SEP 24 2003
OFFICE OF THE CLERK

Nos. 03-109 and 03-123

IN THE

Supreme Court of the United States

ANN M. VENEMAN, SECRETARY OF AGRICULTURE, *et al.*,
Petitioners,

v.

MONTANA WILDERNESS ASSOCIATION, INC., *et al.*,
Respondents.

BLUE RIBBON COALITION, INC., *et al.*,
Petitioners,

v.

MONTANA WILDERNESS ASSOCIATION, Inc., *et al.*,
Respondents.

On Petitions for Writs of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF IN OPPOSITION OF RESPONDENTS

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QUESTIONS PRESENTED

1. Whether this Court should accept review of this case at an interlocutory stage when the District Court has not determined whether the Forest Service violated any statute and has not ordered the agency to take any action.

2. Whether the Court of Appeals erred in holding that the District Court has authority under the Administrative Procedure Act to consider whether the Forest Service has failed to comply with a federal statute dictating that the Forest Service "*shall*, until Congress determines otherwise," administer certain Wilderness Study Areas in Montana so as "to maintain their presently existing wilderness character and potential for inclusion in the National Wilderness Preservation System."

RULE 29.6 STATEMENT

Pursuant to Supreme Court Rule 29.6, Respondents hereby disclose that they are nongovernmental corporations, but do not have any publicly issued shares, and further disclose there is no parent or publicly held company owning 10% or more of the stock of any of these corporate Respondents.

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Nos. 03-109 and 03-123

IN THE

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ANN M. VENEMAN, SECRETARY OF AGRICULTURE, *et al.*,
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MONTANA WILDERNESS ASSOCIATION, INC., *et al.*,
Respondents.

On Petitions for Writs of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF IN OPPOSITION OF RESPONDENTS

Respondents Montana Wilderness Association, Inc., Friends of the Bitterroot, Inc. and American Wildlands, Inc. respectfully submit this brief in opposition to the petitions for certiorari filed by the Solicitor General in No. 03-109[1] and by Petitioners Blue Ribbon Coalition, Inc., *et al.*, in No. 03-123.

STATEMENT

In the Montana Wilderness Study Act, Pub. L. No. 95-150, 91 Stat. 1243 (1977), Congress designated nearly one million acres of land in Montana as wilderness study areas, and

[1] This brief refers to the Petition for a Writ of Certiorari filed by the Solicitor General as "Pet.," and its appendix as the "Pet. App."

it ordered that those study areas "*shall*, until Congress determines otherwise, *be administered by the Secretary of Agriculture so as to maintain their presently existing wilderness character* and potential for inclusion in the National Wilderness Preservation System." *Id.* § 3(a) (emphasis added). The District Court found in this case that the Forest Service, which administers these lands, "has failed to consider whether, how, and to what extent its management decisions have impacted the wilderness character of the areas as they existed in 1977, as the statute requires," Pet. App. 26a-27a, and granted summary judgment for plaintiffs. The Court of Appeals affirmed in part but reversed the grant of summary judgment, finding that "the record reveals a genuine issue of material fact as to whether the Forest Service has discharged its duty to administer the Study Areas so as to maintain their wilderness character and potential for inclusion in the Wilderness System." *Id.* at 10a. Thus, at this stage of the litigation, no relief has been awarded against the federal defendants, and it remains unclear whether any obligations of any kind ever will be imposed upon them.

Nevertheless, the Solicitor General and other petitioners seek review of the determination of the Ninth Circuit that the District Court may *consider*, under § 706(1) of the Administrative Procedure Act and potentially other provisions, whether the Forest Service has failed to comply with its mandatory, nondiscretionary duty to administer the study areas so as to maintain their wilderness character and potential for inclusion in the wilderness system, as Congress explicitly directed. Similarly, in a second case in which the Solicitor General and others have filed petitions for certiorari challenging the scope of judicial review under § 706(1), the Tenth Circuit has ruled only that the District Court may consider at trial whether the Bureau of Land Management has failed to administer other wilderness study areas in Utah "in a

manner so as not to impair the suitability of such areas for preservation as wilderness," as required by the Federal Land Policy and Management Act, 43 U.S.C. § 1782(c). *Southern Utah Wilderness Alliance v. Norton*, 301 F.3d 1217 (10th Cir. 2003), *petitions for cert. filed*, 72 U.S.L.W. 3105 (U.S. July 18, 2003) (No. 03-101); 71 U.S.L.W. 3751 (U.S. May 19, 2003) (No. 02-1703).

There is no reason for the Court to hear either of these cases at this time. The Ninth Circuit simply has held that the Forest Service's alleged failure to comply with a mandatory, nondiscretionary duty may be *challenged* under § 706(1). In essence, the court ruled only that the District Court may consider the merits of the case. The § 706(1) issue has not been finally resolved in either of these cases, and the issues, factual record and claims in each case inevitably will evolve as the cases proceed further in the courts below. In addition, the decisions of the Ninth and Tenth Circuits do not conflict with prior decisions of this Court or of other circuits, and the limited rulings of the courts in these cases are fully consistent with the principles of judicial review set forth in the APA.

There is an additional reason not to "hold" the petition for certiorari in this case, as the Solicitor General requests. This case has been pending since 1996, and the Ninth Circuit has reversed the judgment of the District Court and remanded the case for further factual development. Even if this Court were to grant the petitions in the *Southern Utah Wilderness* case, there is no question but that the District Court and the Ninth Circuit here will follow whatever rulings this Court may make concerning the scope of judicial review under § 706(1). There is no reason to hold in abeyance for up to a year the further factual development ordered by the Ninth Circuit. For the reasons set forth in this opposition, however, Respondents respectfully submit that the petitions for certiorari in both cases should be denied.

A. The Underlying Statutory Scheme.

In 1967, the Forest Service undertook an inventory of certain roadless and undeveloped areas in national forests. Pet. App. 15a. Nine specific wild areas in Montana, which the Forest Service rejected for further wilderness study, *id.*, became the subject of special congressional attention. These areas encompass high mountain peaks, alpine lakes and deep forested valleys – pristine, wild expanses that Congress determined deserved further consideration for possible wilderness designation. In 1977, Congress enacted the Montana Wilderness Study Act ("MWSA") to "provide for the study of certain lands to determine their suitability for designation as wilderness." Pub. L. No. 95-150, 91 Stat. 1243 (1977). The Act mandates that the Secretary of Agriculture "*shall*, until Congress determines otherwise," administer nine specific Wilderness Study Areas ("WSAs") in Montana so as "to maintain their presently existing wilderness character and potential for inclusion in the National Wilderness Preservation System." *Id.* § 3(a) (emphasis added).

The statute allowed five years for study and two years for executive review and recommendations. *Id.* § 2. Thus, Congress intended that, within seven years after the Act was passed, it would determine, based on recommendations of the President, whether or not the nine wilderness study areas should be included in the Wilderness System. Over 25 years later, Congress has made a final decision with respect to only two of the study areas. Thus, the Secretary remains subject to Congress's command, set forth in the MWSA, that the Forest Service shall maintain the "existing wilderness character" of the remaining seven study areas and their potential for inclusion in the Wilderness System.

B. The Administrative Procedure Act.

As this Court has emphasized, the Administrative Procedure Act, 5 U.S.C. § 701 *et seq.*, codifies a broad presumption in favor of judicial review of agency action. *Abbott Labs. v. Gardner*, 387 U.S. 136, 140-41 (1967). The APA applies not only to "agency action made reviewable by statute," but also to any other "final agency action for which there is no other adequate remedy in a court." 5 U.S.C. § 704. Any person "adversely affected or aggrieved by agency action" may seek review. *Id.* § 702.

Section 706(1) of the APA provides that federal courts "shall" "compel agency action unlawfully withheld or unreasonably delayed." Section 706(2)(A) authorizes a court to "hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." The "agency action" at issue in each provision is specifically defined by the APA to include "failure to act." 5 U.S.C. § 551(13). However, the Act provides that a court may not review an agency's activities "to the extent that (1) statutes preclude judicial review; or (2) agency action is committed to agency discretion by law." 5 U.S.C. § 701(a).

C. The Proceedings Below.

1. The Montana Wilderness Association and other plaintiffs ("MWA") filed suit on October 9, 1996, alleging that the Forest Service had "unlawfully withheld or unreasonably delayed" action, 5 U.S.C. § 706(1), or had acted arbitrarily and capriciously or had abused its discretion, § 706(2)(A), by failing to maintain the wilderness character of the seven study areas for which Congress has not yet acted. In particular, MWA contended that the Forest Service had allowed vastly increased use of snowmobiles and four-wheeled all-terrain vehicles ("ATVs") in the study areas to such an extent that the

wilderness qualities of the areas as they existed in 1977 were lost. MWA alleged that the Forest Service had allowed traditional "pack and saddle" trails to be converted into motorized routes that resembled roads, and had allowed ATVs – which were not commercially available in 1977 – to use these trails.[2] This explosion of motorized use not only caused physical damage to the study area lands, but also impaired the opportunities for solitude that is an essential attribute of wilderness character. MWA further alleged that the Forest Service had permitted this significant increase in motorized use without making any formal, reviewable decision. Indeed, an important aspect of plaintiffs' claim is that the Forest Service is creating wider trails or standing by and allowing ATVs to do so *without* developing any reviewable plan or environmental impact analysis. MWA alleged that rarely, if ever, has the agency even considered whether the "presently existing wilderness character" of the study areas is being maintained. Plaintiffs challenged the agency's failure to act in accordance with the nondiscretionary mandate of the MWSA under both § 706(1) and § 706(2)(A) of the APA.

Recreationists seeking greater motorized use in the study areas were allowed to intervene in the suit ("Coalition"). Among other preliminary motions, the Coalition moved to dismiss the action, arguing that the MWSA was not subject to judicial review under the APA. Contrary to the position it is now urging in this Court, the Forest Service acknowledged the District Court's jurisdiction to consider plaintiffs' claims under

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[2] The legislative history of the MWSA revealed that occasional motorized use had occurred in some of the WSAs and that Congress expected that such use would continue. This sporadic motorized use had been sufficiently limited, however, such that it did not impede Congress from declaring that the areas deserved further wilderness consideration. MWA has never argued that motorized use *per se* is prohibited by the Act.

§ 706(1). Order, *MWA v. United States Forest Serv.*, CV 96-152-M-DWM, at 4 (D. Mont. Feb. 13, 1998). The District Court denied the motion to dismiss, ruling that the MWSA "is not a 'general statutory mandate to protect resource values' as suggested by the Coalition, but rather a specific congressional order directed at specific designated areas of federal land within Montana." *Id.* at 5.

The parties then submitted cross-motions for summary judgment on certain counts. Plaintiffs tendered extensive evidence in support of their allegations that the Forest Service had failed to prevent "substantially increased motorized use of [the] WSAs, which has resulted in increased environmental damage, disruption of wildlife and despoiling of aesthetic values," all in derogation of Congress's explicit mandate in the MWSA that the Forest Service maintain the existing wilderness character of the study areas and their potential for inclusion in the wilderness system. Pet. App. 14a. The Forest Service did not deny that motorized use had increased in the study areas.

In its assessment of the summary judgment motions, the District Court focused primarily on an issue of statutory construction. The Forest Service argued that it need *not* "maintain [the] presently existing wilderness character" of the wilderness study areas, Pub. L. No. 95-150, § 3(a), so long as it preserved their "potential for inclusion in the National Wilderness Preservation System," *id.* *See* Pet. App. 21a. Under this view, new trails for motorized use in the wilderness areas could be allowed, so long as the traces of those trails could be removed within a reasonable time after Congress selected the area for designation as wilderness. *Id.* As summarized by the District Court: "The Forest Service and the Intervenors do not argue that motorized use has not increased, nor do they argue that this increased use has had no effect on the Wilderness Study Areas. Rather, they argue that whatever

motorized use is now allowed does not compromise the areas' potential for designation as Wilderness Areas." *Id.*

The District Court rejected this interpretation of the statute. Consistent with *Chevron USA, Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), the court based its analysis on the MWSA's plain language. The District Court observed that Congress had not used the identical phrases contained in § 3(a) in any other statute. Pet. App. at 19a. But employing an ordinary canon of statutory construction, the court sought to import meaning to *both* phrases in § 3(a) so that neither was rendered superfluous. *Id.* at 21a. The court explained: "To accept the Forest Service's argument, one must ignore the first phrase of Congress' imperative. . . . Under the Defendants' and Intervenors' reading, the phrase 'presently existing wilderness character' is surplusage. . . . To ignore part of what Congress said in a statute is not reasonable, even under a deferential reading." *Id.* The court thus held:

> Because the Forest Service has interpreted the Act to require only that the areas' potential for wilderness designation be maintained, it has failed to consider whether, how, and to what extent its management decisions have impacted the wilderness character of the areas as they existed in 1977, as the statute requires. I conclude that the Forest Service has "unlawfully withheld or unreasonably delayed" its maintenance of the Montana Wilderness Study Areas' 1977 wilderness character. 5 U.S.C. § 706(1); Complt. at 7, ¶ 12. Plaintiffs are entitled to summary judgment on Count I.

Pet. App. 26a-27a. Having so ruled, the District Court did not consider whether the Forest Service's failure to maintain the

wilderness character of the study areas was arbitrary and capricious or an abuse of the agency's discretion in violation of § 706(2)(A) of the APA, as also alleged by the MWA.

The District Court did consider other specific claims brought by plaintiffs. The court granted summary judgment for MWA on Counts III and VI of the complaint, ruling that the Forest Service had abused its discretion and acted arbitrarily and capriciously, 5 U.S.C. § 706(2)(A), and had acted "short of statutory right," *id.* § 706(2)(C), in conducting particular trail maintenance and improvement activities in specific WSAs without developing "discernible criteria for assessing and maintaining the wilderness character" of those areas. Pet. App. 27a.

Lastly, the District Court fashioned a remedy for the violations it had found. The court did not compel the Forest Service to exercise its discretion in any particular way or order any type of wholesale revision of the agency's management of the wilderness study areas. Rather, the court concluded that "[t]he appropriate remedy is to allow the Forest Service to consider its management of the Montana Wilderness Study Areas in light of the correct statutory standard." *Id.* at 28a. Thus, it ruled that plaintiffs were entitled to declaratory and injunctive relief requiring the Forest Service "to comply with the statute" and "to take reasonable steps to restore the wilderness character of each Montana Wilderness Study Area if its wilderness character has been diminished since 1977." *Id.* The language of the court's injunction simply tracked the language of the statute. *Id.* at 30a.

2. On appeal, the Ninth Circuit, in a unanimous decision written by Judge Trott, affirmed in part, reversed in part, and remanded for further proceedings. With regard to the § 706(1) issue, the Court of Appeals observed at the outset that judicial review is permissible if plaintiffs make a showing of

"'agency recalcitrance . . . in the face of a clear statutory duty or . . . of such a magnitude that it amounts to an abdication of statutory responsibility.'" Pet. App. at 7a (quoting *ONRC Action v. BLM*, 150 F.3d 1132, 1137 (9th Cir. 1998)). The court emphasized that agencies cannot be compelled to abide by mere generalized statements of policy in a statute, but it found that the MWSA "does more than provide a mere policy statement or general guidance; it establishes a management directive requiring the Forest Service to administer the Study Areas to 'maintain' wilderness character and potential for inclusion in the Wilderness System." Pet. App. at 8a-9a. Contrasting an earlier case that did not involve such a "clear duty" to act, the court stated that "the Forest Service's duty to maintain wilderness character and potential is a nondiscretionary, mandatory duty that it may be compelled to carry out under Section 706(1)." *Id.* at 9a. The court also concluded that the Forest Service could not insulate itself from all review by taking some action, however minimal:

> Here, the duty is to maintain a specified goal, *i.e.*, wilderness character and potential for inclusion in the Wilderness System. . . . While the Forest Service recited the requirements of the Act in some of its decisions, those decisions did not assess whether wilderness character and potential had actually been maintained in the Study Areas. The simple fact that the Forest Service has taken some action to address the Act is not sufficient to remove this case from section 706(1) review.

Id. at 9a-10a.

On the merits, however, the Court of Appeals reversed and remanded for further proceedings. The court ruled that a violation of the MWSA and § 706(1) was not established

simply because the Forest Service had failed to *consider* the impact of its decisions on the wilderness character of the study areas as it existed in 1977. Rather, "a simple failure to consider without more is not enough to violate the duty *if* the area has been 'administered so as to maintain [its] presently existing wilderness character and potential for inclusion' in the Wilderness System." *Id.* at 10a (emphasis in original; alteration in original). The court found that "[t]he Forest Service presented sufficient evidence to support its claim that it has administered the Study Areas so as to maintain wilderness character and potential," *id.*, while noting that the plaintiffs had submitted evidence indicating the opposite. The court thus held that the record revealed a genuine issue of material fact. Accordingly, it reversed the District Court's grant of summary judgment, vacated the injunction, and remanded for trial.

The Court of Appeals also reversed the District Court's determination that the Forest Service had violated § 706(2)(A) of the APA through its specific trail maintenance and improvement work in two of the wilderness study areas. The court concluded that this "routine maintenance work" was not "final agency action" reviewable under the APA. Pet. App. 6a. The court quoted this Court's statement in *Lujan v. National Wildlife Federation*, 497 U.S. 871, 899 (1990), that plaintiff "cannot demand a general judicial review of the BLM's day-to-day operations." Pet. App. 7a. The court held that trail maintenance activities were merely an interim aspect of the Forest Service's planning process, rather than the consummation of it, and did not fit any of the statutorily defined categories for agency action. *Id.* The court noted, however, that these activities could be considered in connection with plaintiffs' allegation that the Forest Service had failed to comply with its mandatory duty to maintain the wilderness

character of the study areas and their potential for inclusion in the wilderness system. *Id.* at 7a n.3.

REASONS TO DENY THE PETITIONS

I. Review Should Be Denied Because of the Interlocutory Posture of this Case.

This Court has a long tradition of declining to exercise its certiorari jurisdiction over cases that "await final judgment in the lower courts." *Virginia Military Institute v. United States*, 508 U.S. 946 (1993) (Scalia, J., concurring in denial of certiorari). This tradition is based on the "pruden[ce]" inherent in allowing lower courts to resolve and clarify issues so that this Court may conserve its limited resources. *Id.* The pending proceedings ordered by the Ninth Circuit in this case provide textbook reasons to conclude that the government's arguments for certiorari are premature. If this case proceeds in the District Court, the claims now argued by the government may be mooted, or the issues that might come before this Court for review may be significantly altered. The relevant factual record also will be further developed. The Court thus should decline jurisdiction until the lower court proceedings have run their course.

1. Although this Court's statutory grant of jurisdiction for cases arising out of the federal circuit courts does not contain a finality requirement, 28 U.S.C. § 1254(1), this Court has frequently exercised its discretion not to grant certiorari in cases for which further proceedings are pending in the lower courts. *See, e.g., American Constr. Co. v. Jacksonville, Tampa & Key West Ry. Co.*, 148 U.S. 372, 384 (1893); *Brotherhood of Locomotive Fireman and Enginemen v. Bangor & Aroostook R.R. Co.*, 389 U.S. 327, 328 (1967) (per curiam). Certiorari jurisdiction "is to be exercised sparingly, . . . [a]nd, except in extraordinary cases, the writ is not issued until final decree." *Hamilton-Brown Shoe Co. v.*

Wolf Bros. & Co., 240 U.S. 251, 258 (1916). As the Solicitor General has noted many times in the past, where "the court of appeals [has] remanded the case to the district court . . . this Court ordinarily does not review interlocutory decisions." Cert. Opp. at 6, *Tocco v. United States*, No. 02-1225 (2003); *see also, e.g.*, Cert. Opp. at 11, *Hsia v. United States*, No. 99-680 (1999). The wisdom of this position is obvious: where further proceedings remain, issues raised in a petition for certiorari may be mooted or further illuminated in the lower courts, sparing this Court from expending its resources inefficiently. While the Court is free to take cases for which further proceedings are pending, "in the absence of [an] unusual factor, the interlocutory nature of a lower court judgment will result in the denial of certiorari." Robert L. Stern, Eugene Gressman, Stephen M. Shapiro, & Kenneth S. Geller, *Supreme Court Practice* § 4.18 at 260 (8th ed. 2002).

2. This case presents no such unusual factor; to the contrary, there are strong prudential reasons to deny the petition and allow the lower courts to proceed with the case. Most obviously, lower court proceedings could moot the government's argument that 5 U.S.C. § 706(1) does not bar the type of agency non-action at issue. At this point in the litigation, the only issue that has been decided by the Ninth Circuit is that the District Court may *consider* Respondents' § 706(1) claims. Although Respondents strongly maintain that the Forest Service has violated § 706(1), it is possible that the lower courts might find that Respondents are not entitled to the relief they seek on the merits or are entitled to such relief only on wholly separate grounds, thus mooting the § 706(1) issue. Claims also can be mooted or changed by subsequent factual developments. There is no pressing need that warrants a grant of certiorari when the sole injury the government may suffer is

that it must continue to defend its position in the District Court.[3]

The premature nature of the government's arguments is brought out even more strongly by the fact that Respondents may only obtain relief that is wholly consistent with the framework the federal defendants claim is the governing law. While the government claims in these cases that further proceedings would allow the courts to "compel [agency] conduct . . . of an ongoing programmatic nature," *see* Pet. of the Solicitor General in No. 03-101 at 15, no such order was previously entered, or ever may be entered, in this case. As described further *infra* at 21-25, a court may compel an agency to make a decision or implement a duty, even if the agency retains discretion over how to carry out that duty. Thus, it is wholly possible that *if* the District Court finds after remand that the Forest Service has failed to act "to maintain [the] presently existing wilderness character" of the study areas and their "potential for inclusion" in the national wilderness system, the court merely may order the Forest Service to *comply* with its mandatory statutory duty, without dictating *how* the agency must do so. It is wholly speculative to assume that the lower courts will exert "some broader, free-ranging power to oversee agency conduct" of an "ongoing programmatic nature." Pet. of the Solicitor General in No. 03-101 at 15.

Furthermore, even if this Court were to hear this case, it would not resolve all the issues that the case may present. Although the District Court granted relief on Count I pursuant to § 706(1), an agency's "failure to act" also may constitute "final agency action," *see* 5 U.S.C. § 551(13), reviewable as arbitrary and capricious or an abuse of discretion under

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[3] A denial of certiorari at this stage will not bar the government from raising these same issues in a future petition. *See, e.g., Hamilton-Brown Shoe Co.*, 240 U.S. at 257-59.

§ 706(2)(A). Where granting certiorari would not fully dispose of the litigation, there is even less reason for this Court to hear a case in an interlocutory posture. *E.g.*, Cert. Opp. at 6, *Tocco v. United States*, No. 02-1225 (2003) (noting in criminal case that where an interlocutory petition for certiorari does not present all the issues that might come before the Court, denying certiorari "promotes judicial efficiency by ensuring that all of the defendant's claims can be consolidated and presented in a single petition to the Court"); *see also Nike, Inc. v. Kasky*, 123 S. Ct. 2554, 2557 (2003) (dismissing writ as improvidently granted and noting that "even if we were to decide the First Amendment issues presented to us today, more First Amendment issues might well remain in this case, making piecemeal review of the Federal First Amendment issues likely") (Stevens, J., concurring in dismissal of writ as improvidently granted).

Most importantly, however, denying certiorari at this stage would allow the lower courts to clarify the issues in a manner that would be useful to this Court should it ultimately decide to hear the case after the remand. This case has not yet even reached the point where a decision on the merits can be rendered. Further factual development of the issues at trial will be critical in determining whether the government's level of non-action is cognizable under §§ 706(1) or (2). The District Court alone can develop that factual record and lay a clearer groundwork for any review of the §§ 706(1) and (2) issues that is necessary in the future.

II. Review Should Be Denied Because There Is No Conflict with Decisions of This Court or Other Circuits.

Petitioners seek to manufacture a conflict between the decisions in this case and the *Southern Utah Wilderness* case, on the one hand, and this Court's decision in *Lujan v. National*

Wildlife Federation, 497 U.S. 871 (1999), and the Fifth Circuit's decision in *Sierra Club v. Peterson*, 228 F.3d 559 (5th Cir. 2000) (*en banc*), on the other. But no such conflict exists.

For three reasons, the decision in *Lujan* does not suggest that review is warranted here. One, *Lujan* is fundamentally a case about standing. 497 U.S. at 875 ("In this case, we must decide whether respondent . . . is a proper party to challenge actions of the Federal Government").

Two, the Court in *Lujan* did not even cite, much less discuss, § 706(1). Given that *Lujan* did not address the scope of judicial review under § 706(1), or the circumstances in which agency action may be found to have been "unlawfully withheld or unreasonably delayed," 5 U.S.C. § 706(1), there is no conflict with the decisions of the Ninth and Tenth Circuits at issue here.

Three, the discussion of reviewable "agency action" in *Lujan* arose in a context very different from that present here. Plaintiffs in *Lujan* did not seek to compel the government to comply with a specific statutory mandate. Rather, as characterized by the Court, plaintiffs sought to challenge in one action under the APA "'each of the 1250 or so individual classification terminations and withdrawal revocations' effected under the [BLM's] land withdrawal review program." 497 U.S. at 881 (internal citation omitted); *see also id.* at 890 (describing case as involving challenge to "the entirety of petitioners' so-called 'land withdrawal review program'"). Consistent with the nature of these allegations, the District Court initially had granted a very broad preliminary injunction prohibiting the BLM from "'[m]odifying, terminating or altering any withdrawal, classification, or other designation governing the protection of lands in the public domain that was in effect on January 1, 1981,' and from '[t]aking any action

inconsistent' with any such withdrawal, classification, or designation." *Id.* at 879-80 (internal citation omitted).

In other words, rather than challenge any particular agency action, the *Lujan* plaintiffs had lumped together over 1,000 discrete agency actions, as well as actions as yet untaken, *id.* at 891, 893, and challenged all of them as one large "program." Moreover, and critical to the Court's standing analysis, the *specific* harm that would give rise to plaintiff's standing – but which had not yet occurred – unquestionably was reviewable as final agency action. The Court emphasized that before any mining could occur that would give rise to plaintiff's standing, either a formal permit or formal notice must issue, either of which would constitute "agency action ripe for review." *Id.* at 892 n.3. In addition, before such specific agency action actually took place, "it is impossible to tell where or whether mining activities will occur." *Id.* It is thus unsurprising that the Court viewed the case solely as an attempt at "*wholesale* improvement of this program by court decree," *id.* at 891 (emphasis in original), for which the plaintiffs lacked standing.

In contrast, Respondents here challenge the Forest Service's failure to comply with a specific statutory mandate applicable to seven wilderness study areas, and no judicial review or intervention of the sort sought in *Lujan* has been countenanced in the decisions below. The District Court rejected the Forest Service's assertion that, despite the explicit language of the MWSA, it was *not* required to "maintain [the] presently existing wilderness character" of the seven study areas. To remedy this error, the court ruled that it would "*allow the Forest Service* to consider its management of the Montana Wilderness Study Areas in light of the correct statutory standard." Pet. App. 28a (emphasis added). The Ninth Circuit then reversed the District Court's grant of summary judgment, finding disputed issues of fact. At this

point in the litigation, it is wholly speculative that the Ninth Circuit would countenance "some broader, free-ranging power to oversee agency conduct" of "an ongoing programmatic nature." Pet. of the Solicitor General in No. 03-101, at 15. Indeed, the Ninth Circuit also reversed – relying explicitly on *Lujan* – the District Court's grant of summary judgment on Counts III and VI, precisely because it found that those counts challenged trail maintenance activities that did not constitute final agency action, and rather sought review of day-to-day operations. Pet. App. 7a. The Ninth Circuit's decision is hardly inconsistent with *Lujan*.

The instant case also is fundamentally different from *Lujan* in that plaintiffs here allege (and have shown) that substantial impairment of the wilderness study areas already is occurring, virtually always without any formal action being taken by the Forest Service. The Forest Service here could do *nothing* and the harm alleged by Respondents could fully and irrevocably occur. This case is thus unlike *Lujan*, where no significant mining activity could occur without the issuance of a permit. In *Lujan*, the alleged harm had not yet occurred, and it could *only* occur pursuant to a specific, reviewable decision. Here, the wilderness degradation prohibited by Congress is occurring. *Lujan* simply did not involve the core issue in this case: whether, and under what circumstances, an agency's failure to comply with a specific, mandatory duty to maintain the wilderness character of seven study areas can be reviewed as a "failure to act" under §§ 551(13), 706(1) and 706(2) of the APA.

These same differences exist with respect to the decision of the Fifth Circuit in *Peterson*. There, the Sierra Club "challenged the Forest Service's entire program of allowing timber harvesting in the Texas forests." 228 F.3d at 563. The District Court granted relief on that scale, entering a permanent injunction barring the Forest Service from allowing *any* timber

harvesting in Texas except in emergency situations. *Id.* at 565. The Fifth Circuit reversed, emphasizing that although judicial review could occur, it could only take place in the context of the specific permit approvals that would issue before any harm could be occasioned to the forest:

> Underlying the district court's opinion was a concern that finding no final agency action here "would put all of the Forest Service's on-the-ground violations of the NFMA and regulations beyond review." *This concern is misplaced insofar as the environmental groups still may challenge discrete site-specific sales allowed by the Forest Service.*

Id. at 568 (internal citation omitted; emphasis added). The court continued: "Requiring plaintiffs to challenge individual timber sales may place a higher burden on environmental groups wishing to monitor Forest Service management practices. However, this does not allow us to disregard the jurisdictional requirement of a final agency action." *Id.* at 569. The question presented in *Peterson* was very similar to that presented in *Lujan*, but markedly different from that presented here.

It is undisputed that § 706(1) *requires* a court, in an appropriate case, to "compel agency action unlawfully withheld or unreasonably delayed." Similarly, the "agency action" that is subject to review under both §§ 706(1) and (2) includes a "failure to act." 5 U.S.C. § 551(13). In the instant case no permit must issue before the challenged impairment of the wilderness study areas may occur, as was the case in *Lujan* and *Peterson*. Although it remains to be seen whether Respondents in this case can establish a "failure to act" to warrant relief under the APA, and it further remains to be seen what type of relief the courts would impose for such a failure, there is

nothing in either *Lujan* or *Peterson* that suggests that there simply is *no* set of facts on which Respondents could establish that the Forest Service has failed to comply with the statutory mandate in the MWSA. Neither of those cases holds that the scope of § 706(1) is limited to compelling an agency to perform an isolated, reviewable act, and the Petitioners cite no other authority for this proposition. If § 706(1) were so limited, then the Forest Service simply could stand by and allow a fleet of 200 humvee vehicles to enter a wilderness study area, wholly immune from review of the statutory command that it "*shall*, until Congress determines otherwise," maintain the existing wilderness character of these study areas.

For these reasons, review is not warranted in this case to resolve the asserted conflict between the decision of the Ninth Circuit and the decisions in *Lujan* and *Peterson*.

III. Review Should Be Denied Because the Decision of the Ninth Circuit Is Consistent with Established Principles of Judicial Review under the APA.

The limited and interlocutory ruling of the Ninth Circuit that the District Court may *consider* Respondents' claims under § 706(1) is consistent with the plain text of the statute and established principles of judicial review. Section 706(1) provides that a federal court "shall" "compel agency action unlawfully withheld or unreasonably delayed." 5 U.S.C. § 706(1). By its unambiguous terms, the MWSA mandates that the Secretary of Agriculture "*shall, until Congress determines otherwise*," administer specific wilderness study areas in Montana "*so as to maintain their presently existing wilderness character* and potential for inclusion in the National Wilderness Preservation System." Pub. L. No. 95-150, § 3(a), 91 Stat. 1243 (1977) (emphasis added). The mandatory nature of the obligation at issue in this case could not be clearer, even if the agency retains substantial discretion regarding *how* it may

fulfill the statutory command. *See United States v. Monsanto*, 491 U.S. 600, 607 (1989) (noting, with regard to Congress's use of the word "shall," that "Congress could not have chosen stronger words to express its intent"); *Bennett v. Spear*, 520 U.S. 154, 175 (1997) ("any contention that the relevant provision of [law] . . . is discretionary would fly in the face of its text, which uses the imperative 'shall.'").

The government essentially contends that the agency's compliance (or failure to comply) with this mandate is unreviewable, even if the Forest Service were to wholly ignore it. The Ninth Circuit properly rejected the claim that there is no set of acts upon which Respondents could prove an entitlement to relief.

At the outset, it is significant that the APA *does* provide that certain agency activities are exempted from judicial review. Specifically, § 701(a) of the Act provides that a court may not review an agency's activities "to the extent that (1) statutes preclude judicial review; or (2) *agency action is committed to agency discretion by law*." 5 U.S.C. § 701(a) (emphasis added). But it is equally significant that the government does *not* attempt to argue in its petition that the decision of the Ninth Circuit is wrong because the Forest Service's administration of the wilderness study areas in Montana is "committed to agency discretion by law" and therefore unreviewable. It seeks to accomplish that same result, but without trying to prove that this case falls within the explicit and narrow exception to judicial review created by Congress in the APA. *See Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 410 (1971) (holding that § 701(a)(2) exception to judicial review is "very narrow").

1. It is broadly established that, in an appropriate case, an agency may be compelled to comply with a nondiscretionary, but also non-ministerial, duty. For instance,

in *NAACP v. Secretary of Housing and Urban Devlopment*, 817 F.2d 149 (1st Cir. 1987), the First Circuit – in a unanimous opinion written by then-Circuit Judge Breyer – rejected the notion that the fact that an agency retains discretion regarding *how* to comply with a mandatory statutory duty means that the agency's alleged *failure* to fulfill that duty is unreviewable. The court emphasized that although HUD possessed "broad discretionary powers" with regard to the statutory command at issue, "[t]his fact . . . does not in itself mean that HUD is immune from review for 'abuse of discretion' in exercising those powers." *Id.* at 157. The court explained that such judicial review need *not* involve the court in managerial decisions or "in reweighing matters that Congress has asked HUD to balance," *id.* at 158; rather, a reviewing court could fashion an appropriate remedy "while at the same time preserving for the agency its discretionary options." *Id.* at 159.

The court in *NAACP* thus held that review of an agency's alleged failure to comply with a mandatory statutory duty was reviewable under both § 706(1) and § 706(2)(A) of the APA. The court concluded that to preclude such review under § 706(1) "would be inconsistent with the need to provide a 'hospitable interpretation' of the APA." *Id.* at 160 (internal citation omitted). Further, the court emphasized that "[t]he APA defines 'agency action' to include 'failure to act,'" and that "[t]he purpose of § 706(2)(A) is to provide for judicial review of agency action *and inaction* that falls outside its statutory power" and constitutes an "abuse" of the agency's "discretion." *Id.* (emphasis added).

Numerous other cases have also reached similar results. For instance, only last month the Eighth Circuit agreed with the First Circuit that HUD's compliance with its mandatory duty to promote fair housing, 42 U.S.C. § 3608(e)(5), is reviewable under the APA. *Darst-Webbe Tenant Ass'n Bd. v. St. Louis Housing Auth.*, 339 F.3d 702, 712-14 (8th Cir. 2003). And in

Public Citizen Health Research Group v. Commissioner, Food & Drug Administration, 740 F.2d 21, 32-35 (D.C. Cir. 1984), the District of Columbia Circuit held that a claim that the FDA had failed to require adequate warning labels on aspirin products as allegedly required by 21 U.S.C. § 352(h)(2) could be reviewed under the "unreasonably delayed" standard of § 706(1); *see also, e.g., Iowa ex rel. Miller v. Block*, 771 F.2d 347, 349-52 (8th Cir. 1985) (permitting review under APA of Secretary of Agriculture's failure to implement disaster relief programs); *Adams v. Richardson*, 480 F.2d 1159, 1161-63 (D.C. Cir. 1973) (upholding action against HEW under APA for failure to enforce antidiscrimination provisions of Title VI).

In these cases – as in the decisions of the Ninth and Tenth Circuits for which Petitioners now seek review – courts have recognized a distinction between compelling an agency to comply with a mandatory duty that required the exercise of discretion, on the one hand, and dictating *how* that discretion actually would be exercised, on the other hand. This critical distinction has long been recognized in the administrative context by this Court, as well. *See, e.g., Addison v. Holly Hill Fruit Prods.*, 322 U.S. 607, 622-23 (1944) ("This Court has on several occasions required the Interstate Commerce Commission to take jurisdiction when it declined to do so or to discharge a duty laid upon the Commission by statute. The district court would not be telling the Administrator how to exercise his discretion but would merely require him to exercise it. It is a remedy against inaction.") (citations omitted). In discussing § 706(1), the Attorney General's Manual – often cited by Petitioners – makes exactly this point. "Obviously the clause does not purport to empower a court to substitute its discretion for that of an administrative agency and thus exercise administrative duties. . . . However, . . . a court may require an agency to take action upon a matter, without directing how it shall act." Attorney General's Manual on the

Administrative Procedure Act, at 108 (1947). This Court has frequently upheld review of highly discretionary decisions where there was a specific statutory mandate and law to apply. *See Japan Whaling Ass'n v. American Cetacean Soc'y*, 478 U.S. 221 (1986); *Dunlop v. Bachowski*, 421 U.S. 560 (1975); *United States ex rel. Kansas City Southern Ry. v. ICC*, 252 U.S. 178 (1920).

2. Petitioners also claim that § 706(1) only affords relief comparable to that afforded by a writ of mandamus. But even if true, the relief sought by Respondents is in no way contrary to the law of mandamus. In fact, the law of mandamus further supports the decision below.

Petitioners claim that mandamus is unavailable whenever agency action involves the exercise of discretion. The remedy afforded by mandamus, however, is not so limited. Rather, courts issue writs of mandamus even where the agency retains discretion to determine *how* to satisfy a statute's mandate. As this Court has recognized:

> Mandamus is employed to compel the performance, when refused, of a ministerial duty, this being its chief use. It also is employed to compel action, when refused, in matters involving judgment and discretion, but not to direct the exercise or judgment or discretion in a particular way nor to direct the retraction or reversal of action already taken in the exercise of either.

Wilbur v. United States ex rel. Kadrie, 281 U.S. 206, 218 (1930); *see also, e.g., Pennsylvania v. National Ass'n of Flood Insurers*, 520 F.2d 11, 26-27 (3d Cir. 1975), *overruled on other grounds*, *Pennsylvania v. Porter*, 659 F.2d 306 (3d Cir. 1981) (in case involving agency's alleged failure to act, "mandamus may issue to require the exercise of permissible discretion,

although the manner in which the discretionary act is to be performed is not to be directed by the court"); *Flynn v. Schultz*, 748 F.2d 1186, 1194 (7th Cir. 1984); *Edgerton v. Kingsland*, 168 F.2d 128, 130 (D.C. Cir. 1947). Thus, "even in an area generally left to agency discretion, there may well exist statutory . . . standards delimiting the scope or manner in which such discretion can be exercised. In these situations, mandamus will lie when the standards have been ignored or violated." *Carpet, Linoleum & Resilient Tire Layers, Local Union No. 419 v. Brown*, 656 F.2d 564, 566 (10th Cir. 1981) (quoting *Davis Assocs., Inc. v. Sec'y, Dep't of Hous. & Urban Dev.*, 498 F.2d 385, 389 & n.5 (1st Cir. 1974)).

In sum, the decisions of the Ninth and Tenth Circuits in these cases are wholly consistent with established principles of judicial review under the APA, as well as under the law of mandamus. There is nothing in these interlocutory rulings, which merely allow these proceedings to continue – without determining whether Respondents ultimately are entitled to relief under § 706(1) or other provisions of the APA, and without determining what that relief ultimately would be – that warrants the immediate intervention and review by this Court.

CONCLUSION

The petitions should be denied.

Respectfully submitted,

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September 24, 2003

No. 03-123

Supreme Court, U.S.
FILED
OCT 8 - 2003
OFFICE OF THE CLERK

In The
Supreme Court of the United States

BLUE RIBBON COALITION, et al.,

Petitioners,

v.

MONTANA WILDERNESS ASSOCIATION, et al.,

and

UNITED STATES FOREST SERVICE, et al.,

and

MIDDLE FORK PROPERTY OWNERS ASSOCIATION, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

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14 pp

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INTRODUCTION

This case asks the Court to consider the manner in which federal courts may review agency "inaction" under the Administrative Procedure Act (the "APA"). The Court should grant the petition for certiorari to consider whether one may bypass "traditional" APA section 706(2) review of final agency action by framing theirs as an APA section 706(1) claim targeting agency "inaction." This case presents important jurisdictional issues that will not benefit from further activity in the lower courts. Circuit Courts split on the jurisdictional analysis, and the new approach created by the Ninth Circuit's decision here will dramatically expand and alter traditional APA jurisdictional review, with broad ramifications for executive branch administrative agencies, federal courts, and interested members of the public. This Court should hear this case to define and clarify the proper boundaries of APA section 706(1) review.

REASONS FOR GRANTING THE PETITION

A. The Important Public Issues Presented and Judicial and Administrative Economy Justify this Court's Review of the Decision Below.

Nothing about the procedural context of this case diminishes the need for this Court to offer guidance on the fundamental APA jurisdictional issues presented. Respondents argue this Court "has a long tradition" of refusing to hear cases "that 'await final judgment in the lower courts.'" Br. in Op. 12 (citing *Virginia Military Institute v. United States*, 508 U.S. 946 (1993)). Respondents argue further proceedings below might "moot" or "alter" the

issues brought for review before this Court. *Ibid.* These arguments are not correct.

This Court has often heard cases which were not fully or finally resolved in the lower courts. Respondents' concerns were considered and rejected in *Forsyth v. Hammond*, 166 U.S. 506 (1897), in which Justice Brewer noted that the petition identified several conflicts, and concluded "although no final decree has been entered, it seemed to us a duty to bring the case and the question here for examination at the earliest possible moment." *Id.* at 515. The Court further noted the power of certiorari "extends to every case pending in the circuit courts of appeal, and may be exercised at any time during such pendency. . . . " *Id.* at 514. Later decisions of the Court clarify that review of a nonfinal judgment is appropriate when the issue involved is "fundamental to the further conduct of the case." *United States v. General Motors Corp.*, 323 U.S. 373, 377 (1944); see also *Gillespie v. U.S. Steel Corp.*, 379 U.S. 148, 153-154 (1964); *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 685 n.3 (1949); *Land v. Dollar*, 330 U.S. 731, 743 n.3 (1947). Several cases, including *Land* and *Larson*, involved procedural contexts similar to this case, in which trial court rulings resolving the case were reversed in the court of appeals and the case remanded for trial.

Additionally, the Court has often, without specifically mentioning the "fundamental to further conduct" rationale, granted certiorari to consider important issues presented through cases involving circuit court decisions reversing the district court and remanding the case for trial or further proceedings. *St. Paul Fire & Marine Ins. Co. v. Barry*, 438 U.S. 531, 536 (1978) (petition granted "[t]o resolve the conflicting interpretations of [Sherman

Act] adopted by several Courts of Appeals"); *Butz v. Economou*, 438 U.S. 478, 480-481 (1978) (certiorari granted in case involving governmental immunity "[b]ecause of the importance of immunity doctrine to both the vindication of constitutional guarantees and the effective functioning of government. . . . "); *Occidental Life Ins. Co. v. EEOC*, 432 U.S. 355, 358 (1977) (involving Ninth Circuit reversal of trial court's decision awarding summary judgment for defendants). The Court certainly has discretion to grant the petition(s) and review the Ninth Circuit's decision here.

This case fits well within the cases outlined above and there are numerous reasons why the Court should grant certiorari here. The rights at issue are certainly public rights, framed in the geographical context of the Nation's diverse and voluminous public lands. The APA principles at issue are of even broader importance, because the APA provides the jurisdictional starting point for nearly all judicial review of agency action, since "there is hardly ever any need for Congress" to create "a private right of action against the *federal* government. . . . " *NAACP v. Secretary of Housing and Urban Development*, 817 F.2d 149, 152 (1st Cir. 1987) (italics in original); *Lujan v. National Wildlife Federation*, 497 U.S. 871, 882 (1990) (explaining that where there is "no specific authorization in the substantive statute" review proceeds under the APA). As pointed out by Petitioners here and in Nos. 02-1703, 03-101, and 03-109, there is substantial confusion, if not direct conflict, between varied circuit and district courts over the correct treatment of the APA section 706(1) cause of action.

There is little question that resolution of this issue is "fundamental to further conduct of the case." Respondents contend that "the only issue" decided by the Ninth Circuit

is that the district court "may consider Respondents' § 706(1) claims." Br. in Op. 13. Actually, the district court already considered and agreed with Respondents' section 706(1) claims, but the Ninth Circuit, in a dramatic departure from the "record review" of a typical APA case, determined a *trial* must be held so that the district judge, apparently sitting as a finder of fact, can determine whether or to what extent the Forest Service has satisfied its duty under the Montana Wilderness Study Act to maintain wilderness character and potential for inclusion. But see *Florida Power & Light Co v. Lorion*, 470 U.S. 729, 743-744 (1985) (explaining focal point for judicial review is administrative record relied upon by agency). Petitioners contend that Respondents' efforts fail to properly invoke the district court's jurisdiction, while the Ninth Circuit decision not only allows the action to continue but dictates that a trial is necessary to resolve this case. This trial will likely consider the 1977 and present "wilderness character and potential for inclusion" of "nearly one million acres of land in Montana." Br. in Op. 1-2. Such a trial presents a daunting and unprecedented undertaking in an APA case. Given the Ninth Circuit's direction on remand, there appears little opportunity to renew or refine Petitioners' jurisdictional questions. None of Respondents' concerns diminish the need for guidance from this Court on the proper interpretation of APA section 706(1) jurisdiction.

Beyond this case, it would disserve judicial and administrative economy for this Court to delay review. As explained in the Petition(s) here and in No. 02-1703, the Ninth Circuit's decision and the Tenth Circuit's decision in *Southern Utah Wilderness Alliance v. Norton*, 301 F.3d 1217 (10th Cir. 2002), are already being applied to allow expanded review of ongoing agency activity under APA

section 706(1). Rather than forcing the parties in these and other cases to endure ongoing confusion, it far better serves the interests of all involved to grant review here to better define the nature of judicial review of agency inaction.

B. The Decision Below is Inconsistent, if Not in Conflict, with Decisions of this Court and Other Circuits.

The Ninth Circuit's decision cannot be squared with prior decisions of this Court, its own prior decisions, and those of other Circuit Courts of Appeals. Respondents' attempts to distinguish *Lujan v. National Wildlife Federation*, 497 U.S. 871 (1990) and *Sierra Club v. Peterson*, 228 F.3d 559 (5th Cir. 2000), *cert. denied*, 532 U.S. 1051 (2001) are unpersuasive. Respondents argue that these cases involved efforts to "lump together" discrete actions and challenge them all "as one large 'program'" as opposed to Respondents' challenge to the Forest Service's alleged "failure to comply with a specific statutory mandate. . . . " Br. in Op. 17. Respondents ignore the fundamental unifying factor: each case focuses on broad geographic areas and broad legal duties, *not* on any discrete *final agency action* applying the legal duty to the broad geographic area targeted in the complaint. *Lujan* counsels, at least where the agency has acted on the legal duty at issue, that a focus on "a specific 'final agency action' [that] has an actual or immediately threatened effect . . . " is the "traditional . . . and normal, mode of operation of the courts." *Lujan*, 497 U.S. at 894.

Respondents entirely ignore the Ninth Circuit decisions in *ONRC Action v. BLM*, 150 F.3d 1132 (9th Cir. 1998) and *Ecology Center v. U.S. Forest Service*, 192 F.3d

922 (9th Cir. 1999). The D.C. Circuit Court of Appeals employed the same reasoning as *Ecology Center* to affirm dismissal of section 706(1) challenges reflecting "nothing more than substantive disagreement with the agency's legal rulings." *Assoc. of Civilian Technicians v. Federal Labor Relations Authority*, 283 F.3d 339, 344 (D.C. Cir. 2002). Respondents similarly ignore *ONRC Action*, in which the Ninth Circuit affirmed a district court dismissal of a section 706(1) claim based on statutory duties similar to the one in this case, finding that the duties in question were not the type of "clear statutory duty" subject to a proper section 706(1) claim. *ONRC Action*, 150 F.3d at 1139 and n.7.

Respondents finally argue that their case is distinguishable because they "allege (and have shown) that substantial impairment of the wilderness study areas already is occurring, virtually always without any formal action being taken by the Forest Service." Br. in Op. 18. Respondents seemingly argue that the vehicle access to which they object is occurring in the absence of *any* agency action. This statement is incorrect. *All* vehicle access on Forest Service lands flows from *some* agency decision. Contrary to Respondents' implication, there is no general presumption allowing unrestricted, or any, vehicular access to WSAs or any Forest Service lands. The Forest Service authorizes and restricts vehicle access through a public planning process. 36 C.F.R. § 219.21 (Forest Plan); 36 C.F.R. part 295 (travel plan). Respondents may now be dissatisfied with their failure to challenge *past* decisions to authorize use, and are sufficiently experienced to understand the difficulty of succeeding in a section 706(2) "arbitrary and capricious" challenge to the agency's chosen

balance in Forest Plan or travel management plan decisions. Rather than identifying the absence of an opportunity for judicial review of Forest Service vehicle access decisions, Respondents hope through section 706(1) to create a new, broader and easier method of review.

C. Respondents' Jurisdictional Vision Would Dramatically Expand APA Review.

Respondents' view, now endorsed by at least two Ninth Circuit panels, would allow creative private interests to subject federal land management agencies to perpetual litigation challenging the agencies' failures to take "complete" action on broad and discretion-laden duties. Such is not the result of "established principles of judicial review under the APA," but would represent a profound "paradigm shift" in the relationship between the judiciary and executive branch agencies. Br. in Op. 20.

Respondents cite several decisions in characterizing theirs as a typical challenge under section 706(1). Br. in Op. 22-23. Careful analysis of these decisions reveals they are distinguishable and only amplify the confusion surrounding section 706(1) and the resulting need for guidance from this Court. First on this list is *NAACP v. Secretary of Housing and Urban Development*, 817 F.2d 149 (1st Cir. 1987). *NAACP* must be considered in light of the unique statutory language at issue, in which Congress specifically directed the Department of Housing and Urban Development must act "in a manner affirmatively to further" the policies of the Fair Housing Act. *Id.* at 151. More importantly, the First Circuit's decision seemingly turns on the analogy to cases finding section 706(1) can be used to compel an official " 'to exercise his discretion where

he has obviously failed or refused to do so.'" *Id.* at 160 (quoting *Mastrapasqua v. Shaughnessy*, 180 F.2d 999, 1002 (2d Cir. 1950)). Thus, *NAACP* only reaffirms the principle that section 706(1) can be used to challenge a total failure to act, but offers no guidance on the central issue of this case, namely, whether allegations that an agency has only *partially* discharged a statutory duty can constitute a viable section 706(1) claim.

This distinction also covers Respondents' additional cited authority. For instance, *Iowa ex rel. Miller v. Block*, 771 F.2d 347 (8th Cir. 1985) is clearly a "total inaction" instead of a "partial inaction" case, for the court there compared the situation at issue to "the Secretary's failure to implement a program entirely, not simply his failure to grant aid in a particular case . . . " and "regard[ed] this fact as the essential point distinguishing . . . *Heckler v. Chaney*, 470 U.S. 821 (1985). . . . " *Id.* at 350 and n.2. Similarly, *Adams v. Richardson*, 480 F.2d 1159 (D.C. Cir. 1973) involved allegations that the agency "has consciously and expressly adopted a general policy which is in effect an abdication of its statutory duty." *Id.* at 1162. Finally, Respondents' cited section of *Public Citizen Health Research Group v. Commissioner, Food & Drug Admin.*, 740 F.2d 21 (D.C. Cir. 1984) only endorses judicial intervention via section 706(1) when an agency has utterly abdicated a statutory duty to act or is "lag[ging] unreasonably" in reaching *any* decision. *Id.* at 32. *Public Citizen* involved a challenge to FDA's failure to reach any decision on a petition alleging aspirin products must carry a warning about Reye's Syndrome. Despite the agency's failure to take timely action, the D.C. Circuit Court of Appeals held that "respect for the integrity of the administrative process . . . precludes judicial review, prior to a

definitive agency resolution" of the petition. *Id.* at 35. In short, none of these cases add anything beyond the rule summarized in *Ecology Center v. U.S. Forest Service*, 192 F.3d 922, 926 (9th Cir. 1999), requiring a proper section 706(1) claim to target a "genuine failure to act."

There is no "genuine failure to act" in this case. The Forest Service has not abdicated its duty to regulate human and vehicle access or to maintain wilderness character. The agency has expended countless hours and dollars issuing numerous decisions authorizing and restricting vehicle access in Montana's National Forests and the WSAs at issue. Pet. Br. 12-13. Counsel skillfully maneuvers around this fact, acknowledging only that the alleged impairment of WSAs "is occurring, *virtually always without* any formal action being taken by the Forest Service." Br. in Op. 18 (emphasis added). In short, Respondents can only dispute the degree and sufficiency of agency action taken, but cannot identify its absence. Such claims should be barred by the "genuine failure to act" rule of *Ecology Center*, *Peterson*, and *Civilian Technicians*.

If Respondents are correct, any section 706(1) claim survives jurisdictional scrutiny if framed as a challenge to "partial" compliance with a statutory duty. Until the Ninth Circuit's decision here and the Tenth Circuit's decision in *Southern Utah Wilderness Alliance*, no court has adopted Respondents' interpretation of section 706(1). At most, Respondents' cited authority demonstrates the confusion in the lower courts and provides fodder for presenting the merits of this case to the Court. This Court should grant certiorari to consider the important and timely questions concerning the proper nature of APA section 706(1) review.

CONCLUSION

For the reasons stated above, and in the petitions for writ of certiorari in this matter and in No. 02-1703, the Petition for a Writ of Certiorari should be granted, or, alternatively, held for disposition in light of a decision in Nos. 02-1703 and 03-101.

Respectfully submitted,

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